## APPENDIX

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### I.

### DOCKET ENTRIES

(U. S. District Court, Middle District of Pennsylvania)

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May 5, 1949, Complaint. Summons issued returnable 20 days after service. Copies of complaint, summons and copy handed U. S. Marshal.

May 16, 1949, Summons returned served May 12, 1949; also copy of complaint.

May 20, 1949, Defendants request for extension of 20 days within which to file answer.

May 28, 1949, Objections of plaintiff to defendant's request for an extension of time to file an answer.

May 31, 1949, Answer of defendant; and counter-claim.

June 14, 1949, Amendments to answer.

June 16, 1949, Plaintiff's reply to counter-claim.

August 10, 1949, Deposition of Edward K. Ploner on behalf of plaintiff.

August 31, 1949, Plaintiff's motion for summary judgment; notice that said motion will be brought on for hearing 9-13-49 at 10:00 a.m. at Harrisburg.

August 31, 1949, Proof of service of motion and notice.

Sept. 5, 1949, Appearance of S. A. Schreckengaust, Jr., Esquire, as attorney for defendant.

Sept. 15, 1949, Stipulation of counsel continuing hearing on motion for summary judgment to October 11, 1949, at Harrisburg, Pa., at 10:00 a.m.

Sept. 15, 1949, Order approving stipulation.

Sept. 16, 1949, Notice of approval by Judge Follmer mailed counsel of record.

Oct. 6, 1949, Copy of order Miscellaneous Docket No. 84 continuing motion court from October 11 to October 14, 1949, mailed counsel of record.

Oct. 10, 1949, Motion for leave to amend answer and consent to filing of amended answer and order allowing defendant to amend his answer.

Oct. 10, 1949, Amended answer and acceptance of service thereof.

Oct. 14, 1949, Defendant's affidavit under Rule 56.

Oct. 14, 1949, Argument on motion for summary judgment before Judge Follmer. Decision to be handed down.

June 10, 1950, Opinion (Follmer), decree. "The defendant, S. A. Wentling, is permanently enjoined and restrained from committing further acts of unfair competition in relation to fair trade market products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade agreements, and the defendant's counter-claim is dismissed." Copies of opinion and decree mailed counsel of record and the Attorney General. Judgment of a permanent injunction entered against defendant, S. A. Wentling, as stated in the decree filed this date.

*Docket Entries*

July 7, 1950, Notice of appeal from order entered June 10, 1950. Copies of notice of appeal mailed counsel for plaintiff and to the U. S. Circuit Court of Appeals for the Third Circuit. Cash deposit in the sum of $250.00 in lieu of cost bond on appeal.

July 10, 1950, Praecipe to tax plaintiff's bill of costs in the sum of $84.05. Notice that plaintiff's bill of costs will be taxed July 11, 1950, mailed defendant.

July 11, 1950, Plaintiff's bill of costs in the sum of $84.05 taxed in this case.

July 11, 1950, Receipt from Court of Appeals of notice of appeal.

August 7, 1950, Letter from U. S. Court of Appeals acknowledging receipt of files on appeal.

## II.

## OPINION

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This is a suit for injunctive relief and damages under the Fair Trade Act of the Commonwealth of Pennsylvania, approved June 5, 1935, P.L. 266, as amended June 12, 1941, P.L. 128.

The title to the said Act reads as follows:

> "To protect trade-mark owners, distributors, and the public against injuries and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name."

The pertinent portion of the Act, as amended, provides as follows (73 PS 7 and 8):

> "No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to the consumer bears the trade-mark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.

"(b) That the buyer of such commodity require upon his resale of such commodity that the purchaser from him agree that such purchaser will not in turn resell except at the price stipulated by the vendor of the buyer.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

"(a) In closing out the owners stock for the purpose of discontinuing delivering any such commodity.

"(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof.

"(c) By any officer acting under orders of any court or in the execution of any writ or distress."

"Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity."

This Act must be read in connection with Section 1 of the Sherman Act, as amended by the addition of the two proviso clauses known as the Miller-Tydings Amendment (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693 (15 U.S.C. A. 1) ). This Act as so amended reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: Provided Further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity

herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The plaintiff, the manufacturer of a trade-marked product known as "Sunbeam Shavemaster," pleads diversity of citizenship with defendant and bases its claim of the existence of the required jurisdictional amount on the statement that its good will, under certain lawful contracts and its rights under the Pennsylvania Fair Trade Act aforesaid, is in excess of $10,000.00.

Plaintiff further avers that the said Sunbeam Shavemaster is in fair and open competition with commodities of the same general class produced by others; that it is the sole owner of said trade-mark; that the said trade-marked article has a good reputation among wholesalers and retailers and with the public generally; that it has been widely advertised throughout the United States in many nationally distributed publications; that an extremely valuable good will as a consequence of said advertising and of the intrinsic merit of the product attaches to the said article and its trademark; that said article has been and now is sold and

distributed throughout the State of Pennsylvania and plaintiff enjoys a good business therefrom; that plaintiff has entered into a number of retail contracts with retailers doing business in the State of Pennsylvania, and attached to the complaint are copies of the said contracts and Fair Trade Price Lists.

Plaintiff also avers that defendant has been guilty of unfair competition in that it has violated plaintiff's minimum retail price agreements; that he has by advertisement in various publications offered to sell the said trade-marked article at a price less than plaintiff's fair trade price;[1] that plaintiff on several occasions wrote to defendant informing him that its products were sold under the Fair Trade Act of Pennsylvania and requesting defendant to desist from offering for sale or selling said trade-marked article for less than the fair trade price; that plaintiff has received numerous complaints from retailers of its products throughout the country protesting against defendant's cut price advertising; that notwithstanding repeated notifications, defendant wilfully continued to offer for sale and to sell plaintiff's trade-marked Sunbeam Shavemaster at a price of $17.25 still knowing that the fair trade price thereof was $23.50.

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[1]Paragraph V of the complaint states, inter alia, "* * * On page 83 of 'The American Rifleman' for May, 1948, the defendant inserted the following advertisement:

'SCHICK SUPER ELECTRIC SHAVERS
$13.00, Remington Foursome
$14.00, Shavemaster $17.25,
new, latest models. S. A.
Wentling, Palmyra, Penna.'"

Plaintiff finally alleges that such unfair competition on the part of defendant has caused plaintiff great monetary damage and that it has no adequate remedy at law unless defendant is enjoined from further acts of unfair competition.

An answer was filed by the defendant wherein he admitted substantially all of the allegations of the complaint, excepting that he denied that his advertisements constituted offers to sell; denied the jurisdiction of this Court; denied that there was any good will attached to plaintiff's trademark, and finally, for multifarious reasons denied the constitutionality of the Pennsylvania Fair Trade Act. Defendant further filed a counterclaim for damage to his business on the theory that plaintiff's assertion of right under the Pennsylvania Fair Trade Act was contrary to the Sherman Antitrust Act.

Subsequently thereto, and after due notice to defendant, plaintiff took the deposition of Edward K. Ploner, plaintiff's Vice-President. After the filing of the deposition, plaintiff moved for summary judgment under Rule 56, Federal Rules of Civil Procedure, which motion is presently before the Court.

Mr. Ploner in his deposition avers, among other things, that the method of sale and distribution followed by plaintiff is through approximately eight hundred wholesale distributors who, in turn, sell to upward of seventy thousand retailers throughout the entire United State; that its advertising is in national magazines, local newspapers and television; that the company's approximate sales of shavers for 1946 were $1,925,

000.00; in 1947, $4,057,000.00; in 1948, $5,863,000.00, and in the first six months of 1949, $1,847,000.00; that the diminishing sales in 1949 were attributable to the fact the company stayed out of the market for about five months to give their distributors, wholesale and retail, an opportunity to reduce their stock of an old model when a new model was introduced; that the company spent in direct advertising of the Shavemaster in 1946 approximately $98,000.00; in 1947, $250,000.00; in 1948, $354,000.00, and the first six months of 1949, $140,000.00; that when a new model is introduced the company issues a supplement to outstanding Fair Trade contracts in which prices are quoted and the effective date given; that following defendant's advertising the company received complaints from wholesale and retail distributors in Wisconsin, California, Maryland, Delaware, District of Columbia, Pennsylvania, Illinois, Minnesota and Nebraska; that the total sales of Shavemaster in Pennsylvania in 1948 was approximately $420,000.00; that in 1948 the company had about fifty wholesale and seventy-three hundred retail distributors in Pennsylvania; that unchecked violations of Fair Trade prices are detrimental to the sale of trade-marked merchandise.

Thereafter, defendant filed an affidavit setting forth, inter alia, that he never saw any executed contract between plaintiff and any retailer, or the price list shown in Exhibit "A" of the complaint, prior to service of complaint on him; that he did not use the Shavemaster as a loss-leader, and was never notified by plaintiff of the discontinuance of or change in price of Shavemaster.

The complaint avers that following the May, 1948, advertisement in "The American Rifleman" plaintiff on June 8, 1948, wrote defendant as above indicated and attached to this letter two copies of its Pennsylvania Fair Trade Contract, as well as a retail price list, and invited defendant to sign both copies, return to plaintiff after which it would execute a copy and return to defendant and thus include him as one of its cooperating dealers. Defendant continued to advertise as before, whereupon plaintiff again wrote defendant on June 24, 1948, July 23, 1948, and March 4, 1949, and on the latter date by telephone conversation through its counsel again reiterating all that had previously been written. These averments are either admitted or not denied in the answer. The advertisements continued through November, 1948.

In his affidavit defendant avers,

> "2. That he denies ever having seen any executed contract between the Sunbeam Corporation and any retailer prior to service upon him of the complaint.
>
> "3. That he denies ever having seen the price list shown in Exhibit 'A' of the complaint before said complaint was served on him."

The copies of plaintiff's Pennsylvania Fair Trade contracts attached to the complaint as Exhibit "A" purport to be copies of executed contracts. Defendant in his affidavit admits receiving an unexecuted copy of the identical form.

The copy of the price list attached to the complaint as part of Exhibit "A", being the letter and exhibits

referred to therein, which letter defendant in paragraph VI of his answer admits having been forwarded to him, is printed on white paper and quotes prices effective July 5, 1948. Defendant in his affidavit denies the receipt of this price list, but in his answer he admitted the mailing of the letter which referred to the price list and admitted the receipt of a price list printed on yellow paper and which carried the date of April, 1948. Both lists quote the Shavemaster as Cat. No. "3" at $23.50.

From the pleadings, deposition and affidavit there is, in my opinion, no genuine issue as to any material fact.

We have here in the plaintiff the owner of two trademarks, namely, "Sunbeam" and "Shavemaster"; that it advertised and distributed a shaver under those two trade-marks; that it entered into Fair Trade contracts with retailers in Pennsylvania under the provisions of Pennsylvania Fair Trade Act; that defendant with knowledge of outstanding Fair Trade contracts in Pennsylvania and price lists in connection therewith, advertised and sold six Shavemasters for $17.25 each when the listed Fair Trade price was $23.50; that said advertisement specifically used the trade-marked name of "Shavemaster." There is no question but that this plaintiff has at a tremendous expense built up a good will for its trade-marked products.

I see no merit in defendant's captious complaints about his lack of knowledge. He admits receiving a copy of plaintiff's blank form Pennsylvania Fair Trade contract. He complains he did not see an ex-

ecuted copy thereof. I find nothing in the Act to indicate that defendant would be entitled to a copy of an executed contract. He was given a copy of the form of contract used in Pennsylvania and he was told that it was such. That was sufficient notice.[2]

Whether the copy of the price list attached to the complaint giving the effective date as of July 5, 1948, is or is not the same as defendant admits receiving and which was dated April, 1948, is entirely aside from the point. The fact remains both carried the only item we are here concerned with, with the same catalogue number and same price.

Finally, the defendant complains that he was not advised of subsequent price lists. So far as the record goes, the price of this article remained constant throughout the period covered by defendant's advertisements. The objection is therefore without merit.

In Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, the court had before it Sections 1 and 2 of the Illinois Fair Trade Act (Smith-Hurd Rev. Stat., 1935, Ill., c. 121½, Sections 186 and 189) which at that time was substantially the same as Sections 1 and 2 of the Pennsylvania Act. In holding that the Illinois Act was not in violation of the Four-

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[2]In Bristol-Myers Co. v. Lit Brothers, Inc., 336 Pa. 81, the court quoted a finding by the chancellor as follows:

" 'That after defendant had notice * * * that plaintiff had entered into contract with others fixing the resale price of plaintiff's products, it always sold Ipana Tooth Paste * * * and Sal Hepatica * * * at the resale prices fixed by plaintiff in contracts with others';"

teenth Amendment to the Constitution of the United States, the court stated, inter alia,

"In the second place, § 2 does not deal with the restriction upon the sale of the commodity qua commodity, but with that restriction because the commodity is identified by the trade-mark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.

* * * * * * * *

"* * * Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition.' * * *

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business

of the producer and distributor of identified goods, but injurious to the general public as well. * * *"

I find no merit in any of the defendant's many reasons advanced in an effort to prove that the Pennsylvania Fair Trade Act is in violation of the Constitution of the United States or the Constitution of the Commonwealth of Pennsylvania.

As stated in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra, even though this plaintiff parted with the ownership of the six shavers involved in this case, it did not part with the good will that it had at great expense built up around the trade-mark name of those razors, namely, "Sunbeam" and "Shavemaster." This defendant did not advertise merely a razor for sale, he advertised a "Shavemaster" electric razor. By so doing he has invaded a right that this plaintiff has been given by the Fair Trade Act of the Commonwealth of Pennsylvania in respect to a sale made under the terms of that Act and that trade-mark must be kept inviolate whether the sale is intrastate or interstate.

It is true the Pennsylvania Supreme Court has never passed upon the constitutionality of the Pennsylvania Fair Trade Act; on the other hand, it has not hesitated to construe and enforce the Act.[3]

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[3]Lentheric, Inc. v. F. W. Woolworth Co., 338 Pa. 523; Bristol-Myers Company v. Lit Brothers, Inc., 336 Pa. 81. In the latter case the court held that the peculiar facts of the case did not of themselves amount to such unfair competition as the Fair Trade Law forbids. Under the circumstances I feel that Shipman, et al. v. DuPre, 94 L. Ed. 587, has no application here.

In a very well considered opinion in Pepsodent Co. v. Krauss Co., Limited, (D.C.E.D. La.) 56 F. Supp. 922, Judge Borah stated, "The history of the legislation leaves no doubt that Congress enacted the Miller-Tydings amendment with full knowledge of the provisions in state fair trade acts making resale price maintenance effective against non-contracting retailers, and that it was the design and intention of Congress to remove every obstacle which would hinder the free enforcement by the states of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit."

Congress has spoken and the legislature of Pennsylvania has spoken and there is no doubt in my mind what was the legislative intent in both instances. As to the wisdom of such legislation, we are not here concerned. As indicated above, I find nothing in the legislation violative of either the Constitution of the United States nor that of the Commonwealth of Pennsylvania.[4] All of the jurisdictional requirements are present here.

I am, therefore, of the opinion that the admitted acts of the defendant in cutting the price of plaintiff's trade-marked product are in direct violation of the Fair Trade Act of the Commonwealth of Pennsylvania; that the actions of the defendant threaten irreparable damage to the plaintiff;[5] that the plaintiff has no

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[4]For a very able discussion of the constitutionality of a Fair Trade Act of the State of South Carolina similar to that of the Commonwealth of Pennsylvania, see Miles Laboratories, Inc. v. Seignious (D.C.E.D. S.C.) 30 F. Supp. 549.

[5]Apropos of the propriety of injunctive relief in the instant case, in Swift & Company, et al v. United States,

adequate remedy at law and is entitled to the injunctive process of this Court for its protection. A decree for permanent injunction is being filed contemporaneously with this opinion.

June 10, 1950

(s) FREDERICK V. FOLLMER,
*United States District Judge.*

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## III.

## DECREE

Now, to wit., June 10, 1950, the defendant, S. A. Wentling, is permanently enjoined and restrained from committing further acts of unfair competition in relation to Fair Trade marked products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade agreements, and the defendant's counterclaim is dismissed.

(s) FREDERICK V. FOLLMER,
*United States District Judge.*

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276 U.S. 311, 48 S. Ct. 311, 72 L. Ed. 587, Mr. Justice Brandeis, speaking for the court, said:

> "The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated."

[fol. 18] [Stamp:] Received & Filed Aug. 21, 1950. Ida O. Creskoff

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 3400

District Court of Pennsylvania for Middle District of Pennsylvania

SUNBEAM CORPORATION, a Corporation,

vs.

S. A. WENTLING

MOTION FOR LEAVE TO DOCKET APPEAL AND FILE RECORD OUT OF TIME

To the Honorable, the Judges of Said Court:

S. A. Wentling, by Samuel A. Schreckengaust, Jr., of McNees, Wallace & Nurick, attorneys for defendant, moves your Honorable Court for leave to docket the appeal and file the record out of time in the above-captioned proceeding, and in support of his motion, sets forth the following facts:

1. Notice of appeal was given in the above-captioned proceeding on July 7, 1950.

2. On August 8, 1950, following receipt of notice from the Clerk that the record on appeal was received from the District Court, Samuel A. Schreckengaust, Jr., Esquire, the undersigned, sent by regular mail a check for twenty-five dollars ($25.00) to the Clerk to cover the Clerk's fees, together with a duly executed appearance form. A copy of said transmittal letter is attached hereto.

3. On August 17, 1950, the Clerk advised counsel that the requested check was not received by the Clerk within the forty day period allowed by the rules of court, which period expired August 16, 1950.

4. It is the intention of the defendant to prosecute his appeal, and in view of the unexplainable disappearance of said letter containing the check covering the Clerk's fees, leave to docket the appeal and file the record out of time is hereby requested.

[fol. 19] A substitute check for $25.00 is tendered with this motion.

Samuel A. Schreckengaust, Jr. of McNees, Wallace & Nurick, Commerce Building, Harrisburg, Pa. Attorneys for Defendant.

August 18, 1950.

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[fol. 20] WAIVER OF OBJECTION

Sunbeam Corporation, by Joseph D. Morelli, Esquire, of White, Williams & Scott, attorneys, hereby waives all objections to the granting of defendant's foregoing motion for leave to docket appeal and file record out of time.

Joseph D. Morelli of White, Williams & Scott, Land Title Building, Philadelphia, Pa., Attorneys for Plaintiff.

Dated: August 21, 1950.

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[fol. 21] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 3400

District Court of Pennsylvania for Middle District of Pennsylvania

SUNBEAM CORPORATION, a Corporation,

vs.

S. A. WENTLING

ORDER

Defendant's motion for leave to docket appeal and file record out of time is hereby allowed, and the Clerk is directed to docket the case and file the record in the above-captioned proceeding.

So ordered.

Kalodner, *J.*

August 21, 1950.

[fol. 22] [Endorsed:] In the U. S. Court of Appeals for the Third Circuit. No. 3400. District Court of Penna. for Middle District of Pennsylvania, Sunbeam Corporation vs. S. A. Wentling. Motion for Leave to Docket Appeal and File Record Out of Time and Order to Docket Case and File Record.

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[fol. 23] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,280

SUNBEAM CORPORATION, a Corporation,

v.

S. A. WENTLING, Appellant

Appeal from the United States District Court for the Middle District of Pennsylvania

Argued November 10, 1950

Before Maris, Goodrich and Hastie, Circuit Judges

OPINION OF THE COURT—Filed December 8, 1950

By GOODRICH, Circuit Judge:

This appeal involves the application of the Pennsylvania Fair Trade Act.[1] The plaintiff, a manufacturer of electric shavers, complained of violation of the Act by the defendant, an individual retailer doing a mail order business from headquarters in Palmyra, Pennsylvania. The plaintiff claimed, and the defendant does not deny, that the defendant advertised and sold some of the plaintiff's razors at a price lower than the so-called fair trade price. The District Court granted relief in very broad terms.[2]

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[1] Act of June 5, 1935, P.L. 266, as amended June 12, 1941, P.L. 128, 73 Purdon's Pa. Stat. Ann. §§ 7 and 8.

[2] Defendant was "permanently enjoined and restrained from committing further acts of unfair competition in relation to Fair Trade marked products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade

[fol. 24] The defendant conducts a mail order business. He advertises merchandise in publications of national circulation[3] and invites orders for the articles advertised. These articles he ships by mail or express to the buyers. What portion of the defendant's sales results in shipments to Pennsylvania buyers and what portion results in shipments to out-of-state buyers is not disclosed.

The defendant has signed no contract agreeing to maintain a minimum price on plaintiff's razors. But the plaintiff claims that it is entitled to relief under the non-signer provision of the statute which states.

> "Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity." 73 Purdon's Pa. Stat. Ann. §8.

The case involves several points which we shall consider one at a time.

(1) The constitutionality of fair trade legislation under the United States Constitution and that of the Commonwealth of Pennsylvania with regard to due process and equal protection provisions.

This need not detain us long. Similar legislation was pronounced not violative of the federal Constitution in Old Dearborn Company v. Seagram Corporation, 299 U.S. 183 (1936). The plaintiff suggests that the depression conditions which prompted that result in 1936 no longer obtain and if the case now came to the Supreme Court it would be decided the other way. Perhaps so; perhaps not. We

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agreements * * *." In the course of its opinion the District Court states, "The trade mark must be kept inviolate whether the sale is intrastate or interstate." Sunbeam Corp. v. Wentling, 91 F. Supp. 81 (M.D. Pa. 1950).

[3] The advertisements of which defendant complains appeared in two nationally circulated magazines, The American Rifleman and Field and Stream, and in the November 28, 1948, issue of the Boston Sunday Advertiser.

[fol. 25] think, however, the Supreme Court decision settled the constitutionality of the Fair Trade acts so far as due process and equal protection under the Fourteenth Amendment are concerned. We should and do follow it so long as it stands as a declaration of law by the Supreme Court.

Nor do we need to take long in holding the Pennsylvania statute free from attack on the due process or equal protection clauses of the Pennsylvania Constitution. It is true that the Pennsylvania Supreme Court has not passed, in so many words, on the constitutionality of the Act under the Pennsylvania Constitution. But it has applied it, apparently without question of its constitutionality.[4] A Common Pleas Court of Philadelphia has definitely declared it to be constitutional.[5] And the overwhelming weight of decision in other state courts is to the same effect.[6] Whatever may be the wisdom of this legislation we think it well established that legislatures, in enacting it, are not violating the provisions of the United States Constitution as to due process, or equal protection, or the state constitutional equivalents thereof.

(2) The Miller-Tydings Act. This statute[7] was much discussed by both parties at the argument. We think the statute was intended to relieve persons entering into contracts of the type provided for in these fair trade acts from liability under United States anti-trust laws.[8] The legislation was necessary, if such immunity was to be had,

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[4] Lentheric, Inc. v. F. W. Woolworth Co., 338 Pa. 523, 13 A. 2d 12 (1940).

[5] Welch Grape Juice Co. v. Frankford Grocery Co., 36 Pa. D. & C. 653 (1939).

[6] Since the Seagram case the acts have been held unconstitutional in only one state, Liquor Stores, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949). For a list of cases in which the various acts have been passed upon see 2 CCH-Trade Reg. Service § 7128.

[7] 26 Stat. 209 (1937), 15 U. S. C. A. § 1.

[8] In Shwegmann Brothers v. Calvert Distillers Corp., 184 F. 2d 11, 15 (5th Cir. 1950) the court states that the Miller-Tydings amendment "neither authorizes nor prohibits state legislation * * * It is concerned with, and only with, the Sherman Act, legislation by Congress affecting interstate commerce."

because price maintenance agreements had previously been [fol. 26] held to be a violation. Dr. Miles Medical Company v. John D. Parrk & Sons Company, 220 U.S. 373 (1911) (Sherman Act); FTC v. Beech Nut Packing Co., 257 U.S. 441 (1922) (Federal Trade Commission Act). But the Miller-Tydings Act in no way, we think, affects any question of defendant's liability to plaintiff.

In this regard the case of Whitfield v. State of Ohio, 297 U.S. 431 (1936) presents an interesting parallel. In the Hawes-Cooper Act, 49 U.S.C.A. § 60, Congress authorized the states to regulate the sale of prison-made goods even though manufactured in another state and sold within the state in the original package. Ohio had forbidden the sale of such goods in open market and defendant was convicted of violation of the statute. The information involved contained two counts, one based on a sale within Ohio, the other on a sale to an Ohio buyer from an Alabama seller. The Court stated[9] that "A serious question as to the infringement of the commerce clause of the Constitution is presented by the second count * * *," but found it unnecessary to pass on this since the conviction was sustained by the first count which was valid because of the Hawes-Cooper Act. Thus, even though Congress had expressly left the field to state regulation, the Court intimated Congress either had not or could not authorize the states directly to regulate an interstate sale. The case is not controlling here, but is an indication that we should be wary of interpreting the Miller-Tydings Act as anything more of an authorization to the states than the words require.

(3) Application of the statute to interstate transactions. Some at least of the defendant's business is interstate commerce. That point seems to us abundantly clear, but since the parties seemed to have some dispute about it we will stop on it for a moment. First, the purchase of advertising space in a publication published in another state [fol. 27] and of national circulation is interstate commerce.[10] Likewise, when defendant receives an order from

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[9] Whitfield v. State of Ohio, supra, at 437.

[10] To the extent that Blumenstock Bros. v. Curtis Publishing Co., 252 U. S. 436 (1920) can be construed as holding to the contrary we think it is no longer authoritative in the light of more recent cases. United States v. South-

outside Pennsylvania for an article which he fills by mailing it or sending it by express from Palmyra to a point in another state a transaction in interstate commerce has taken place. It is immaterial, so far as this point is concerned, whether "title" passes at the place of shipping or at destination.[11] The shipment would be equally an interstate matter if no passing of title were involved in the transaction. For instance, if A, in Pennsylvania, sends a Sunbeam Shavemaster to his friend in New York as a loan no passing of "title" is involved. But the shipment is certainly interstate commerce.

To state that defendant's business is interstate commerce does not answer the question of the applicability of a Fair Trade Act to such commerce. It is well settled that in the absence of an occupation of the field by Congress a state may regulate some aspects of interstate commerce.[12] But it is just as well settled that even in the absence of Congressional action the commerce clause is a limitation on the power of states to regulate interstate commerce. A state may not regulate the rates [13] or length [14] of trains even on the intrastate portion of an interstate journey; it may not prohibit the importation into the state

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Eastern Underwriters Assoc., 322 U. S. 533 (1944); North American Co. v. SEC, 327 U.S. 686 (1946). Cf. Indiana Farmers Guide Co. v. Prairie Co., 293 U. S. 268 (1934); Charles A. Ramsay Co. v. Associated Bill Posters of United States and Canada, 260 U.S. 501 (1923); Post Printing & Pub. Co. v. Brewster, 246 Fed. 321 (D.C. Kan. 1917); State v. Salt Lake Tribune Pub. Co. 68 Utah 187, 249 Pac. 474 (1926).

[11] Uniform Sales Act § 19, Rule 5. Act of May 19, 1915, P.L. 543 § 19, 69 Purdon's Pa. Stat. Ann. § 143. Since defendant pays the cost of transportation, including insurance against loss, the presumption is that the "sale" takes place outside Pennsylvania as to out-of-state customers.

[12] Cooley v. Board of Wardens, 12 How. 299 (U. S. 1852); California v. Thompson, 313 U. S. 109, 113 (1941); California v. Zook, 336 U. S. 725 (1949).

[13] Wabash, St. Louis and Pacific Ry. v. Illinois, 118 U. S. 557 (1886).

[14] Southern Pacific Co. v. Arizona, 325 U. S. 761 (1945).

[fol. 28] of liquor from another state,[15] nor prohibit its sale by one who purchased it from a seller in another state and while still in the original package;[16] it cannot restrict the export or import of goods for the protection of local economic interests.[17] As Professor Rottschaefer puts it, "One aim of the commerce clause was the protection of interstate trade against state interference. As a limit on state powers, it is a free trade charter for national commerce."[18]

As in so many Constitutional questions the line between permissible and prohibited state regulation is not a clear one. Chief Justice Stone, in Southern Pacific Co. v. Arizona, 325 U.S. 761, 770 (1945) voiced what is apparently

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[15] Bowman v. Chicago & N. W. Ry., 125 U. S. 465 (1888). The Webb-Kenyon Act, 37 Stat. 699 (1913), 27 U. S. C. A. § 22, now prohibits the interstate transportation of intoxicants into any state for use thereof in violation of its laws. It was upheld in Clark Distilling Company v. Western Maryland Railroad Co., 242 U. S. 311 (1917). See McGovney, The Webb-Kenyon Act and Beyond, 3 Iowa L. Bulletin 145 (1917).

[16] Leisy v. Hardin, 135 U. S. 100 (1890). As to intoxicating liquor the rules were changed by the Wilson Act, 26 Stat. 313 (1890), 27 U. S. C. A. § 121 which authorized the states to prohibit the resale of liquor. This Act was said to deprive intoxicating liquor of its interstate commerce character.

[17] Hood & Sons v. DuMond, 336 U. S. 525 (1949); Baldwin v. Seelig, 294 U. S. 511 (1935); Pennsylvania v. West Virginia, 262 U. S. 553 (1923).

[18] Rottschaefer, The Constitution and Socio-Economic Change, 102 (1948). The same idea was forcibly stated by Mr. Justice Jackson thus, "The material success that has come to the inhabitants of the states which make up this federal free trade unit has been most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions." Hood & Sons v. DuMond, 336 U. S. 525, 538 (1949).

the presently accepted approach.[19] He said that "there has been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern. * * * The matters for ultimate determination are * * * whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate [fol. 29] commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference"

It is not difficult to put a case in which non-uniform state laws in this price regulation field will result in a complete block to trade between states in "fair traded" commodities. Here is one. There is no requirement that the established fair trade price be uniform throughout the states.[20] Thus, we have the possibility of a situation where, for instance, the fair trade price of an article has been fixed in Pennsylvania at $1 and in South Carolina at 75 cents. If the Pennsylvania statute is permitted to govern interstate sales, no sales in that commodity can be made by Pennsylvania sellers to South Carolina buyers. If the Pennsylvania seller were to meet the competition of South Carolina sellers, he would commit a tort in Pennsylvania, and yet he would be selling at the very price set in South Carolina as "fair trade." Further, if a state may regulate the price at which an article must be sold if it is to be

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[19] For an excellent and up-to-date discussion of this problem see Dowling, Constitutional Law, Significant Developments in the Law During the War Years, 9 (Practising Law Institute Series, 1948).

[20] The Acts of 30 states authorize a minimum price, whereas the others provide for an absolute price; in 24 states a person other than the owner of the trademark may establish the price, in 21 any other person may not; in 29 states obliteration of the trademark exempts the commodity from the Act, in 13 it does not. For a compilation of these and other variations see 2 CCH-Trade Reg. Service §§ 7011-13.

shipped out of the state, may it not equally well regulate the price for which the article must have been sold before it is allowed to come into the state? Tariff barriers are but feeble obstacles compared with such a blockade on the interstate movement of goods.

The possibility of such a barrier to interstate commerce from non-uniform state regulation illustrates the substantial effect such regulation will have on interstate commerce if applied to interstate sales. Such sales are a fit subject for uniform regulation should Congress desire it, and we see no peculiar local interest which justifies the imposition upon interstate commerce of such restriction by individual states. The local cut-price sale with a loss leader feature, which seems to have constituted a much [fol. 30] stressed argument for the legislation, is adequately cared for in giving the statute a local application only.

These grave constitutional difficulties involved in any broader interpretation lead us to the conclusion that the Pennsylvania Fair Trade Act is to be construed as not to apply to sales by Pennsylvania retailers to consumers in other states, or to advertisements in publications published in other states. The California court dealing with a statute similar to that of Pennsylvania was so sure of this point that it hardly gave the question discussion and construed the California Fair Trade Act "as applying only to transactions within the state, that being the sole territorial extent of the legislature's powers." Max Factor and Company v. Kunsman, 5 Cal. 2d 446, 55 P. 2d 177 (1936). New Jersey has evidently thought the same about its statute.[21] We think a similar construction should be given to the Pennsylvania statute. We are reinforced in this conclusion by the well established line of authority which interprets a statute to conform to constitutional limitations whenever it is possible to do so.[22]

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[21] Johnson & Johnson v. Weissbard, 121 N. J. Eq. 585, 586, 191 Atl. 873 (1937). For a general discussion of the problem and a conclusion similar to that reached here, see 2 CCH-Trade Reg. Service § 7308.

[22] See Kovacs v. Cooper, 336 U. S. 77, 85 (1949); Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 470 (1945); Arizona Employers' Liability Cases, 250 U. S. 400, 430 (1919); United States v. Weisenbloom, 168 F. 2d 698, 700 (2d Cir. 1949).

In view of the position we take on this matter a modification of the District Court decree will be necessary. The decree will be vacated and the case remanded to the District Court with directions to enter a decree limiting the injunction against the defendant to intrastate transactions in Pennsylvania, and for further proceedings not inconsistent with this opinion.

A true Copy:

Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

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[fol. 31] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,280

SUNBEAM CORPORATION

vs.

S. A. WENTLING, Appellant

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: Maris, Goodrich and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decree of the said District Court in this case be, and the same is hereby vacated, with costs, and the case remanded to the District Court with directions to enter a decree limiting the injunction against the defendant to intrastate transactions in Pennsylvania, and for further proceedings not inconsistent with the opinion of this Court.

Attest:

Ida O. Creskoff, Clerk.

December 8, 1950.

(Received & Filed Dec. 8, 1950. Ida O. Creskoff, Clerk.)

[fol. 32] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10280

SUNBEAM CORPORATION, a Corporation

vs.

S. A. WENTLING

ORDER

And Now, to wit, this 20 day of December, 1950, in consideration of the within petition, the plaintiff is granted an extension of time to file its petition for rehearing in the above matter until the Second of January, 1951.

Goodrich, *J.*

(Received & Filed Dec. 20, 1950. Ida O. Creskoff, Clerk.)

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[fol. 33] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10280

SUNBEAM CORPORATION, a Corporation

vs.

S. A. WENTLING

PETITION FOR ORDER EXTENDING TIME FOR THE PLAINTIFF TO FILE A PETITION FOR REHEARING

To the Honorable the Judges of the Court of Appeals for the Third Circuit:

Sunbeam Corporation, plaintiff in the above captioned matter hereby petitions the court for an extension of the time in which it may file a petition for rehearing and by its counsel extends the following reasons therefor:

1. The opinion of this court was filed on December 8th but not received by plaintiff's counsel until December 11th.

2. The opinion of the court has raised matters not considered or not fully discussed in the briefs of the parties

herein. Plaintiff's local counsel and plaintiff's general counsel have been engaged in investigating the problem so raised and this has taken hours of study by counsel involved.

3. Plaintiff's general counsel, because of the serious effect of the court's decision upon the plaintiff and its merchandising policies, is particularly desirous that the [fol. 34] petition for rehearing when filed give this court the full benefit of his thoughts and suggestions. Since the plaintiff's general counsel resides in Chicago, Illinois, a series of air mail letters have passed between Chicago and Philadelphia. Due to the Christmas season, there has been delay in the receipt of some of these letters.

4. Under the rules of court the petition for rehearing should be filed on Saturday, December 23rd, or presumably the next day on which the court will be open, namely December 26th.

5. By reason of the foregoing facts, plaintiff's counsel is unable to properly prepare and have printed the petition in the time allotted by the rules of court.

Wherefore, Petitioner prays the court to grant an order extending until January 2nd, the time within which plaintiff may file the petition for rehearing in this case.

Respectfully submitted, William H. Peace, II, Attorney for Plaintiff.

[fol. 35] [Endorsed:] In the United States Court of Appeals for the Third Circuit. No. 10280. Sunbeam Corporation, a Corporation vs. S. A. Wentling. Petition for Order Extending Time for the Plaintiff to File a Petition for Rehearing and Order Thereon. William H. Peace, II, White, Williams & Scott, Land Title Building, Philadelphia, 10.

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## PETITION FOR REHEARING

*To the Honorable the Judges of the Court of Appeals for the Third Circuit:*

The decree of this Court, December 8, 1950, reversed the decree below (Follmer, D. J.) which enjoined retail sales both intra- and interstate of fair-traded Sunbeam razors at less than fair trade prices, and this court limited the decree to intrastate sales, on the ground that since otherwise a grave constitutional question would arise, the Pennsylvania Fair Trade Act should be construed as applying only to intrastate sales.

This court is respectfully asked to decide the constitutional points, a doubt as to which led the court to so construe the Pennsylvania Fair Trade Act, viz: whether said act would be constitutional if applied to interstate sales, and whether the Miller-Tydings Act was constitutional if it left the way open for such fair trade acts. Plaintiff assigns the following grounds:

1. By removing the only obstacle to the free movement of "fair-traded" goods Congress must have intended to make state fair trade acts effective across state lines. The Miller-Tydings Act bears Congress' imprimatur of constitutionality. It should not be denied effect because of doubt. The strong presumption of constitutionality should prevail. Nor should it be overcome by doubts based upon the dictum of doubt in the Whitfield case (297 U. S. 431, 1936), which related to a count in an Ohio indictment for shipping prison-made goods from an Alabama prison.

2. Congress had the power to make an exception to the Sherman Act. The Miller-Tydings Act either left that segment of commerce not "regulated", leaving the field open to non-discriminatory action by the states pursuant to policies believed to be beneficial, or the removal of the Sherman Act prohibition made national policy inapplicable in order to give effect to state policy in respect to "fair trading".

3. The hypothetical case of non-uniform fair trade prices at retail is contrary to the fact. Plaintiff's prices are in fact uniform throughout all the 45 states. This is to be reasonably inferred from the facts of record: the price is fixed and supplements are sent out to each state. Inherent in the subject matter is the requirement that fair trade prices of nationally advertised goods must be uniform within a competitive area.

4. Permitting mail order price cutting would destroy fair trade price structures and gravely limit or wholly wipe out interstate trade in trade-marked goods.

5. The California and New Jersey rulings were prior to the passage of the Miller-Tydings Act. It was unnecessary to reënact the Pennsylvania Act in order to make the Miller-Tydings Act apply. (See *Wilkeson v. Rahrer*, 140 U. S. 545, 565 [1891].) The Miller-Tydings Act was adopted after twelve state fair trade acts had been passed, and in order to make effective those and other like state acts.

6. The Pennsylvania Fair Trade Act does not fix fair trade prices but merely authorizes this to be done on fair-traded goods.

7. Plaintiff's United States trademark is interstate in character and entitled to protection in its interstate operation.

8. The decree below did not interfere with interstate commerce but merely with defendant's price-cutting activities.

9. The Miller-Tydings Act and the fair trade acts of 45 states have resulted in an enormous volume of commerce across state lines in nationally advertised trademarked goods sold in large part in smaller shops in reliance on the manufacturer's trademark and in competition with goods of other manufacturers and the private brands of department stores and other large retail establishments.

10. The Fifth Circuit, in *Schwegmann Brothers v. Calvert Distillers Corp.*, 184 F. (2d) (1950), has upheld an

injunction enforcing a plan to make the fair trade acts effective across state lines.

11. Fair trading increases interstate commerce instead of diminishing it.

This court is respectfully referred to accompanying brief.

Respectfully submitted,

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*Of Counsel.*

## CERTIFICATE

Ira Jewell Williams, counsel for the Sunbeam Corporation, petitioner herein does hereby certify that the foregoing petition is presented in good faith and not for delay.

IRA JEWELL WILLIAMS.

## BRIEF IN SUPPORT OF PETITION FOR REHEARING

### 1. The Power of Congress as Exercised

As to interstate sales, either the Congress has spoken or Congress has not spoken. If Congress has not spoken, then the act could be unconstitutional only because the Commerce Clause is self-executing and impliedly prohibits the interstate movement of goods shipped under state fair trade laws. This cannot be in respect of non-discriminatory acts pursuant to state policies, deemed for the welfare of the state. But the Congress has spoken. By the Miller-Tydings Act, it has left not merely a void open for state action, but it has carved out an exception to the Sherman Act and its anti-trust policy. It has said that the prohibition of the Sherman Act shall not apply to fair trade acts as to trade-marked goods. The repeal of a prohibition is an effective expression of policy. The power of Congress over commerce and price fixing therein arises under the Commerce Clause which gives Congress power to "regulate" commerce between the states. The Sherman Act was enacted under that clause and relates to interstate transactions only. That is the only way in which Congress has "regulated" that phase of interstate transactions. The Congress is the policy-making power in that interstate field, and it has declared that the Sherman Act policy not apply here. The doubt as to constitutionality does not find sound basis in the doubts in the Whitfield case. The Ohio indictment in the Whitfield case (297 U. S. 431 [1936]) had two counts: (a) one for shipping prison-made goods from the prison in Alabama to a person in Ohio, and the other (b) for the "open market" sale in Ohio of such prison-made goods. (The act prohibited (b) only.) It was as to (a) that the court (Sutherland J.) expressed the Constitutional doubts: and why not, making an Ohio crime out of a shipment *from* an *Alabama* prison? (And the doubt was dictum: the Ohio act did not apply at all.) But the court fully sustained (b), Ohio's power over what happened in Ohio, though the pri-

son-made goods had come in interstate from Alabama, and fully sustained Congress' power so to permit Ohio, whether the goods were in the original package or no, and notwithstanding the previous immunity (under Supreme Court rulings) of goods while in the "original packages". The prohibitive provisions of the Ohio act were sustained as to goods in the original packages *because Congress had power to decide when goods are in interstate commerce*, and had determined that prison-made goods were not in interstate commerce though still in original packages. By the Miller-Tydings Amendment, Congress opened the way for state fair trade acts to become effective before fair-traded goods are loaded to be shipped across state lines. The doubts in the Whitfield case are far afield here. The parallel would be an Ohio statute forbidding shipments of prison-made goods *from Ohio* or forbidding any sales (including interstate sales) of prison-made goods. For in the case at bar, Pennsylvania dealt only with what was done in Pennsylvania, in which state the sales, whether intra- or interstate, are initiated.

In *Parker v. Brown*, 317 U. S. 341 (1942) the Supreme Court sustained the California Agricultural Prorate Act which controlled the prices of raisins, 95 percent of which were shipped in interstate commerce, and which necessarily increased prices thereon. The court said, at page 360:

> "This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. *Minnesota Rate Cases*, 230 U. S. 352, 399-400; *South Carolina Highway Dept. v. Thompson*, 313 U. S. 109, 113-114 and cases cited; *Duckworth v. Arkansas*, 314 U. S. 390. A *fortiori* there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as

state action serves local ends and does not discriminate again the commerce, *even though the exercise of those powers may materially affect it.*"

And again (page 361):

"All of these cases proceed on the ground that the taxation or regulation involved, *however drastically it may affect interstate commerce*, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs." (Emphasis supplied.)

There is no distinction in principle between controlling prices at the level of production but before shipment in interstate commerce (Brown case) and permissive control of prices at retail after production, before interstate commerce begins.

2. THE MILLER-TYDINGS ACT

To deny the applicability of a state fair trade act to interstate transactions from retailer to consumer is to delete from the Miller-Tydings Act the first eight of the following words: "*in which such resale is to be made*, or to which the commodity is to be transported for such resale." The quoted words apply to goods flowing out of and to goods flowing into a state. They expressly cover interstate transactions. Since the Congress has no power over purely intrastate commerce, those eight italicized words are meaningless unless they apply to interstate sales. The Congress, in exercising its power to "regulate" commerce among the states, has given free course to the operation among the 45 states of their fair trade policy.

3. THE DOUBT AS TO CONSTITUTIONALITY

The "grave doubt" (as to constitutionality) is raised by hypothetical illustration of a non-uniform retail price in

different states. This is contrary to the fact and contrary to the reasonable inference from the record facts. The plaintiff's executive committee fixes the price *and supplemental printed price lists are distributed in all 45 states* (see Mr. Ploner's deposition, pages 3 and 4, and sample supplement attached to the complaint). There is no word to suggest that there is anything but uniformity. The point was not raised below. An important and far reaching ruling ought to be based upon facts, not upon what might happen. A manufacturer must enforce its fair trade contracts uniformly in a competitive area: *Hutzler Bros. Co. v. Remington Putnam Co.*, 186 Md. 210, 46A (2d) 101 (1946); 163 A. L. R. 890. To establish different prices in different states within the same competitive area would invalidate agreements in those states. The activities of nationally advertising mail order houses make the entire 45 states one competitive area and require uniformity throughout, in fairness to all retailers in such states.

4. The Realities of Fair Trade Merchandising

To assume that the evils sought to be corrected by the fair trade acts of 45 states can be adequately cared for by giving those statutes local application only is to ignore the realities of merchandising. There are hundreds of thousands of retailers in this country; plaintiff alone has its products distributed through 70,000 retailers. If mail order houses are free to sell at any price across state lines, local retailers will meet or undercut such prices. Since effective enforcement would be impossible with so many retailers involved, the policy adopted by all but three of the states would be completely defeated. It follows that this court's opinion, if it stands, will destroy a merchandising system used by thousands of manufacturers, built up over many years at very great cost in advertising trademarked products.

### 5. The California and New Jersey Cases Were Prior to the Miller-Tydings Act

When *Max Factor and Company v. Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936) and *Johnson & Johnson v. Weissbard*, 121 N. J. Eq. 585, 191 Atl. 873 (1937) were decided, the Miller-Tydings Amendment to the Sherman Act was not in effect. And, in view of the decision in *Dr. Miles Medical Company v. John D. Park & Sons Company*, 220 U. S. 373 (1911), the state acts could not validly be applied to interstate transactions. Hence the courts of California and New Jersey then limited their fair trade acts so as not to conflict with the Sherman Act. But now the statutes are valid as to interstate commerce, either because the Congress has expressly withdrawn the ban, or because Congress, by abandoning its entrance into that segment of interstate commerce (price fixing of trademarked products), not merely left the way clear for state action, but necessarily evinced its permission therefor. (No need existed for reënactment of the fair trade acts by the states to have the statutes apply to interstate transactions: *Wilkerson v. Rahrer*, 140 U. S. 545, 565 (1891).

### 6. The State Does Not Regulate the Price

The state does not, as suggested by this court's opinion (page 7), regulate the price at which goods must be sold. It merely permits, but does not require, a manufacturer of a commodity bearing a trademark to fix a minimum resale price to consumers, and thus a standard of equal competition among all dealers handling the trademarked product and relying upon that trademark to enable them to sell the product.

### 7. Plaintiff's United States Trademark Should Be Protected in Interstate Commerce

Plaintiff's trademark granted by the United States is interstate in character, and is entitled to protection in its interstate operation. The decision of this court is a

charter for vast interstate mail order business to destroy the effect of fair trade laws of 45 states and to nullify their fair trade policies.

### 8. The Decree Below Merely Interfered with Defendant's Price-Cutting Activities

The decree of the court below did not interfere with interstate commerce; it merely interfered with defendant's price-cutting activities. Defendant's price-cutting is only possible because he operates from his second floor bedroom, with none of the legitimate retailer's usual overhead. Mass merchandising is not practical if confined to bedrooms. Furthermore, if defendant and others can avail themselves, without cost, of the retailing function of constant local display, demonstration and availability of the product, which the legitimate local retailer has already performed and is constantly performing, then the local retailer cannot recover his costs and cannot afford to handle the product. Such predatory conduct by defendant should not be tolerated.

### 9. Two Principal Systems of Distribution and Merchandising at Retail Level

There are two principal systems of distribution and merchandising at the retail level in the United States: In the first, the retailer acts as the purchasing agent for its customers and the customer relies upon *the integrity of the store* in making its purchases, and in the second, the retailer purchases but the customer relies on the reputation and *the integrity of the manufacturer.*

The integrity of the store system applies principally to large department stores, chain stores and mail order houses, almost all of whom offer goods for sale under so-called private brands or without brands. The customer, having confidence in the store, is not concerned with the origin of the merchandise; the store vouches that it is good. The *name* and *reputation* of the store is the property right

upon which this system depends. Less than 10 percent of all stores, being largely department stores, chain stores and mail order houses account for over 50 percent of the retailing business done in the United States. The balance of the retail business in the United States is done by hundreds of thousands of stores, large and small, but mainly very small, who merchandise under the principle of the integrity of the manufacturer, the goods being identified by the trademarks of the manufacturer, and the customer is primarily sold through the national advertising of the manufacturer. The store, in effect, is the last step in a continuous process which begins with manufacture and ends with delivery of the goods into the hands of the ultimate user. The local retailer makes the national advertising effective by the constant local display, demonstration and availability of the product in his store, where the customer, attracted by the manufacturer's advertising, can examine and judge the product. The trademark of the manufacturer is the key property right upon which this system depends. This court would not permit the defendant to appropriate the name of a competitor, yet the decision here permits him to appropriate and use plaintiff's name without his consent and to its great damage.

The integrity of the manufacturer system is the main competitive factor which limits the tendency of a few large stores to monopolize even larger segments of the retail trade. The ruling of this court in this case will in the long run destroy this system which by its very nature requires a uniformity in price. "Distribution and Service" of the Statistical Abstract of the United States (1948) in Section 32 reveal the following facts with respect to the distribution of goods in 1939: Of 1,770,355 retail stores, one-tenth of 1 percent hired 100 or more employees and did 11 percent of all retail business; 9.6 percent hiring 6 or more employees did 54.2 percent of all retail business; 90.4 percent hiring five or less employees did 45.8 percent of such business. The small stores hiring five or less employees cannot possibly

compete with the remaining 9.6 percent on nationally advertised merchandise unless there is a uniformity of price. In a price war, the large units can always operate more economically than the small units and the latter will quickly be pushed out of the market. The manufacturer and the public both suffer from this because large scale mass production, with the consequently lower price to the general public, can only be scheduled on the basis that there are many stores throughout the United States each stocking and actively engaged in selling the manufacturer's products. Once the remaining portion of the retail market gravitates into the hands of a tiny percentage of all of the stores, such widespread distribution of the manufacturer's products becomes impossible, and there is no longer any nationally advertised price standard to serve as a competitive check on high prices charged by the big stores on their private and unknown brand goods.

10. THE FIFTH CIRCUIT HAS SUSTAINED A DECREE MAKING EFFECTIVE AN INTERSTATE PATTERN OF FAIR-TRADING

In the recent fair trade act case of *Schwegmann Brothers et al. v. Calvert Distillers Corp.*, 184 F.(2d) 11, (rehearing denied September 15th, 1950, certiorari applied for December 8, 1950), in which plaintiff expressly alleged a plan of general interstate action and activity and "without distinction between interstate and intrastate sales sought and obtained an injunction whose purpose and effect is to maintain the pattern of restraints on commerce between the states which the plan was designed to, and does, make effective", the Court, (Hutcheson, Chief Judge) said (page 13) "that though the sales made by appellants were made intrastate, the transactions, . . . so affect interstate commerce and the exertion of the power of Congress over it as to bring plaintiffs' activities within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them", and affirmed the decree, holding that the Miller-Tydings Amendment "did remove the Sherman Act

as an obstacle in the way of completely effective State action. . . ." The dissent of Judge Russell was on the ground that the defendant as a non-signer was not within the language of the Miller-Tydings Act.

### 11. Fair-Trading Increases the Flow of Commerce Between the States

Obviously the free flow of interstate commerce is desirable. But the concept means freedom from tariffs or other substantial barriers which would tend unreasonably and unduly to affect the flow of commerce. In this case there is no evidence that fewer of plaintiff's products will be shipped under plaintiff's price structure than under a market demoralized by wild-cat price cutting. Indeed experience shows that the flow will be diminished, not increased, since in the long run price-cutting tends to destroy that mass-merchandising which is the beneficent twin of mass production.

Respectfully submitted,

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[fol. 37] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,280

SUNBEAM CORPORATION, a Corporation

v.

S. A. WENTLING, APPELLANT

SUR PETITION FOR REHEARING

Present: Biggs, Chief Judge and Maris, Goodrich and Hastie, Circuit Judges.

And Now, to wit on January 5, 1951 after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

Herbert F. Goodrich, Circuit Judge.

(Received & Filed Jan. 5, 1951. Ida O. Creskoff, Clerk.)

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[fol. 38] I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant and proceedings in this court in the case of Sunbeam Corporation vs. S. A. Wentling, Appellant, No. 10,280, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 10th day of January in the year of our Lord one thousand nine hundred and fifty-one, and of the Independence of the United States the one hundred and seventy-fifth.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal.)

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1950

No. 538

SUNBEAM CORPORATION, a Corporation,
*Petitioner*

*v.*

S. A. WENTLING,
*Respondent*

---

**Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and Brief in Support Thereof.**

---

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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1950 No.

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SUNBEAM CORPORATION, a Corporation,
*Petitioner,*

*v.*

S. A. WENTLING,
*Respondent.*

---

# Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and Brief in Support Thereof

---

*To the Honorable the Chief Justice and the Associated Justices of the Supreme Court of the United States:*

Sunbeam Corporation petitions for a writ of certiorari to review a decision of the U. S. Court of Appeals for the Third Circuit vacating a decree of the District Court of the United States.

## STATEMENT OF THE MATTER INVOLVED

The District Court granted Petitioner injunctive relief against continuance of that part of Respondent's nationally advertised mail order business which consisted of price-

cutting sales of the trade-marked electric razor, the Sunbeam "Shavemaster", manufactured by Petitioner.

The Court of Appeals harshly reversed by limiting the injunction to intrastate sales only.

Respondent Wentling operated entirely from within Pennsylvania, carrying a stock of goods there, placing his advertising in magazines of national circulation from there, receiving orders there through the mails, shipping goods from there, and receiving the proceeds of his sales in that state.

Petitioner had established minimum resale prices for its products by entering into fair trade contracts under the laws of all forty-five states having fair trade laws, including the Pennsylvania Fair Trade Act of 1935, June 5, P. L. 266, as amended June 12, 1941, P. L. 128. Although varying in detail and incidentals, the fair trade acts of all states comply with the requirements of the Miller-Tydings Amendment, in their basic substantive provisions.

After receiving notice of Petitioner's fair trade contracts and minimum prices thereunder, Respondent wilfully continued his cut-price advertising and sales and use of Petitioner's trade-mark "Shavemaster". Respondent claimed that because his sales were in interstate commerce and because he had refused to sign one of Petitioner's fair trade contracts, he was not required to adhere to the minimum prices so established.

The Pennsylvania Act provides that wilfully and knowingly advertising or selling a fair-traded commodity at less than the price stipulated in any fair trade contract constitutes actionable unfair competition, whether or not the seller was a party to the contract.

The Circuit Court treated the Pennsylvania Fair Trade Act as if the Act itself "fixed" prices, concluding that such state "price-fixing" if extended to interstate commerce would be unconstitutional. The court below also treated this Act as if it embodied a state "regulation" of commerce, which would be unconstitutional if extended to interstate commerce.

Petitioner submits that the fair trade acts do not regulate commerce but merely *permit* individuals by contract to establish fair trade prices. The only regulation of fair trade contracts was commenced when Congress enacted the Sherman Act, thereafter judicially construed to forbid such minimum price contracts. Then Congress further regulated commerce and overrode such judicial construction by enacting the Miller-Tydings Amendment which expressly permitted fair trade contracts embodying the substantive requirements specified in the Miller-Tydings Amendment, when such contracts were legal under state laws.

The Court of Appeals' constitutional difficulty as to the permissible scope of the Miller-Tydings Amendment, and its constitutional difficulty as to the scope and effect of the Pennsylvania Fair Trade Act were both based upon a dictum in the case of *Whitfield* v. *Ohio*, 297 U. S. 431 (1936), which case related to sale of prison-made goods. These difficulties have the same effect as a direct holding of unconstitutionality. These constitutional doubts for all practical purposes nullify the state fair trade acts and hold that the Miller-Tydings Amendment was a vain and useless act of Congress, since in purely intra-state matters the Sherman Act does not apply.

Whatever after-effects upon commerce may result from enforcing the standard of fair and equal competition among retailers by uniform prices established under state fair trade acts, the same are indirect, slight, non-discriminatory and "before any operation in interstate commerce occurs" (*Parker* v. *Brown*, 317 U. S. 341 (1942)).

Petitioner submits that Congress may "regulate" commerce by banning or permitting certain types of contracts "affecting" commerce, even though such regulation may affect commerce drastically. Individuals by their contracts cannot regulate commerce. Every contract between individuals, whether local or across state lines, to the extent that such contract restricts services, labor, capital or tangible property to one use, and thus removes its availability for an alternate use, "affects" commerce. The commerce of the various states and of the United States at any given moment is basically the sum of the myriad of contracts then executory or in course of execution.

In the view of the court below, the Miller-Tydings Amendment and the fair trade acts of the forty-five states would be unconstitutional if construed to permit fair trade contracts to have interstate application. If they do not have interstate application and effect, then such acts are, for all practical purposes, vain and useless. The decision, if allowed to stand, will drastically limit the rights of trade-mark owners, and the good-will value developed through federal trade-marks, which the fair trade acts of forty-five states and the Miller-Tydings Amendment seek to protect.

A vast volume of interstate commerce has been built up by mass production of products to be retailed through thousands of stores by national merchandising, based upon

enormous expenditures for national advertising and sales efforts, predicated upon a uniform price structure. The volume of this interstate commerce constitutes the only effective competition to the centralizing power tendencies (if not monopolistic tendencies) of the few great chain stores, mail order houses and large local department stores.

According to statistics from the United States Census of 1939 (the last census for which full figures are available), in that year there were 1,770,355 retail stores, of which 9.6%, hiring six or more employees, did 54.2% of the total business, while 90.4% of the retail stores, hiring five or less, did the remaining 45.8% of the total retail business. The decision below necessarily gravely injures the 1,675,000 small stores which cannot effectively compete with large stores, great mail order houses, and national chain stores, in selling a given item of nationally advertised merchandise identified by a distinctive trademark, unless there is uniformity of price.

Petitioner submits that the proper application, effect and construction of the Miller-Tydings Amendment and of the state fair trade acts, must be reached by considering them in conjunction with the economic background in which they operate. Because of the huge volume of commerce concerned and for the reasons above given, this case involves important questions of local and federal law which should be settled by this court.

## Basis of This Court's Jurisdiction

The basis of this court's jurisdiction is the Act of June 25, 1948, C. 646, 62 Stat. 928 (1) (28 U. S. C. A. 1254 (1)).

The judgment of the Court of Appeals was entered on December 8, 1950, and the opinion is reported in — Fed.

(2) —. Petition for rehearing was denied by that court on January 5, 1951.

The opinion of the District Court is reported in 91 F. Supp. 81.

## Questions Presented

1. Is not the holding below in conflict with the ruling of the Fifth Circuit (*Schwegmann Bros.* v. *Calvert*, 184 F. (2d) 11, Cert. applied for December 8, 1950, Docket 442) which held that the Miller-Tydings Amendment was effective to permit the establishment of minimum resale prices, under state fair trade laws, which are binding in interstate sales?

2. Did not the Circuit Court of Appeals err in failing to give effect to the Miller-Tydings Amendment which withdrew the Sherman Act ban on minimum fair trade contract, legal under state acts complying with Miller-Tydings specifications?

3. Was not the District Court right in ruling that "Congress has spoken (the Miller-Tydings Amendment) and the legislature of Pennsylvania has spoken and there is no doubt in my mind what was the legislature's intent in both cases", and in granting complete relief as to the trade-marked goods "fair-traded" under the laws of Pennsylvania?

4. Did not the Circuit Court of Appeals err in holding that the Pennsylvania Fair Trade Act would be unconstitutional if construed to permit enjoining interstate price-cutting by individuals operating from headquarters in Pennsylvania?

5. Is not the only regulating of commerce here involved found in the Miller-Tydings Amendment which carved a fair trade exception out of the Sherman Act (held in *Dr. Miles Med. Co.* v. *Park Co.*, 220 U. S. 373 (1911), to apply to trade-marked goods) thereby permitting effectiveness to state fair trade contracts meeting Miller-Tydings specifications?

6. Did not the Circuit Court of Appeals err by construing the Miller-Tydings Amendment to have purely intra-state effect (purely intra-state matters being already within the sole discretion and power of the states) thus imputing to Congress a vain and useless act in adopting the Miller-Tydings Amendment?

7. Should the Circuit Court be permitted to repeal the legislated merchandising policy of forty-five states to protect trade-mark good will by fair trade agreements which prevent unfair price competition which will be distructive of the enormous commerce of mass produced and nationally advertised goods thereunder?

8. Shall the economic value of trade-marks be impaired by destroying the fair trade acts which constitute the principal legislative system devised for their effective protection?

## Reasons for Granting the Writ

1. The decision below is in direct conflict with *Schwegmann Bros.* v. *Calvert Distillers*, 184 F. (2d) 11 (1950) (Cert. applied for Oct. Term, 1950, No. 442), in which the Court of Appeals for the Fifth Circuit affirmed a decree

substantially like the decree of the District Court herein, which was reversed in the Circuit Court.

2. The decision below, if allowed to stand, will for all practical purposes nullify the fair trade acts of forty-five states, as well as the Miller-Tydings Amendment. Thus the constitutional issue presented has very great importance to the vast commerce in trade-marked goods, mass produced for the national market, nationally advertised and nationally merchandised.

3. The Court below restricted the injunction to *intra*-state sales. It did so because of its expressed doubt of the constitutionality of the Pennsylvania Fair Trade Act if construed to apply to *inter*state offerings made from a place of business in Pennsylvania. If the statute had been held invalid as repugnant to the Constitution, there would have been an appeal as of right. It is submitted that Petitioner ought not to be denied a hearing in this court, simply because the reversal in the court below was predicated upon a doubt or "grave constitutional difficulties" rather than upon an explicit denial of right. The result of the doubts of the Circuit Court is to deny effectiveness to the State Act of Pennsylvania. The discretion of this court should be exercised to review a decree predicated upon such doubt.

4. Because of "difficulties" as to its constitutionality, if regarded as permitting enforcement of minimum prices established under fair trade acts where the offer to sell is interstate, the Circuit Court below treated the enactment of the Miller-Tydings Amendment as a useless thing (except solely that it granted immunity from Sherman Act prosecution, and this notwithstanding that if state fair

trade acts are solely intra-state in character and application the Sherman Act does not apply and a law to grant immunity from prosecution thereunder is unnecessary). The effect of this case is the same as holding the Miller-Tydings Amendment unconstitutional. Sound judicature should call for review of a judgment frustrating an Act of Congress because of "constitutional difficulties".

## Prayer

For the foregoing reasons your Petitioner prays that a writ of certiorari may issue out of this court to the United States Court of Appeals for the Third Circuit, commanding said court to certify and send to this court on a day to be determined, the full and complete transcript of the record of all proceedings of such Court of Appeals had in this case, to the end that the case may be reviewed and determined by this court; that the judgment of the Court of Appeals may be reversed and the decree of the District Court reinstated, and that Petitioners be granted such other and further relief as may be proper.

Dated February 7, 1951.

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## PETITIONER'S BRIEF SUR PETITION FOR WRIT OF CERTIORARI

### I. Reference to Opinions Below and to Official Reports

The opinion of Follmer, J., in the District Court, wherein he granted Petitioner's prayer for injunction, is reported in 91 F. Supp. 81 and attached hereto as Appendix A.

The opinion of Goodrich, J., in the Court of Appeals for the Third Circuit, wherein that court reversed the District Court, is reported in — F. (2d) —, and attached hereto as Appendix B.

Petitioner's petition for rehearing in the Court of Appeals was denied on January 5, 1951.

### II. Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked

This court's jurisdiction is invoked under the provisions of the Act of June 25, 1948, C. 646, 62 Stat. 928 (1) (28 U. S. C. A. 1254 (1)).

### III. Statement of the Case

Petitioner manufactures and sells electrical appliances all bearing its trade-mark "Sunbeam" and in this case, particularly involving the electric shaver manufactured by it, the additional trade-mark "Shavemaster".

The Sunbeam Shavemaster is in free and open competition with shaving devices of all kinds, of which there are many on the market; here Respondent advertised two com-

peting electric shavers in the same advertisement in which he offered to sell the Shavemaster at a cut price.

Petitioner's products are sold throughout the United States; in the forty-five states having fair trade acts, they are sold under minimum prices established through contracts permitted by those acts. Retail prices established by Petitioner on its products are uniform throughout all the fair trade states. Petitioner's sales of Shavemasters during the three and one-half years from 1946 through June 1949 amounted to over 13 million dollars and during the same period Petitioner spent over $800,000. advertising this product. In 1948 Petitioner sold approximately 3 million dollars' worth of its products in Pennsylvania, of which about 14% represented Shavemaster sales.

Respondent, residing in Palmyra, Penna., operating out of a second-floor bedroom, in 1948 advertised through national magazines, such as the American Rifleman and Field and Stream, and sold Petitioner's Shavemaster razors by mail at $17.25, which was substantially below their fair trade price of $23.50. The purpose of the advertisement was to induce readers not to buy the Shavemaster at the reader's local retail store (where it was offered at the fair trade price) but to send to Palmyra, Penna., for the Shavemaster. In order to carry out this purpose Respondent used and advertised Petitioner's trade-mark without its consent and over its objections. ("This defendant did not advertise merely a razor for sale, he advertised a 'Shavemaster' electric razor." Folmer, D. J., in the opinion below.) Respondent's purpose to divert sales to himself by this type of competition succeeded, as shown by complaints to Petitioner from dealers in some eight states. Although informed by Petitioner that its products were sold under

minimum prices established by contracts entered into under the Pennsylvania Fair Trade Act, the Respondent refused to comply therewith on the ground that his sales were in interstate commerce and fair trade laws thus did not apply to him.

Petitioner obtained an injunction in the District Court restraining Respondent from:

> ". . . committing further acts of unfair competition in relation to Fair Trade marked products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade agreements. . . ."

On appeal the Court of Appeals for the Third Circuit vacated the decree and limited the injunction to intrastate transactions in Pennsylvania.

## IV. Assignments of Error

I. The learned court below erred in entering the following judgment:

> "This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.
>
> "On consideration whereof, it is now here ordered and adjudged by this court that the decree of the said District Court in this case be, and the same is hereby vacated, with costs, and the case remanded to the District Court with directions to enter a decree limiting the injunction against the defendant to intrastate transactions in Pennsylvania, and for further proceedings not inconsistent with the opinion of this court."

II. The learned court below erred in vacating the following decree of the District Court:

"Now, to wit, June 10, 1950, the defendant, S. A. Wentling, is permanently enjoined and restrained from committing further acts of unfair competition in relation to Fair Trade marked products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade agreements, and the defendant's counterclaim is dismissed."

## V. Argument

### 1. The Miller-Tydings Amendment Constitutionally Affects Interstate Commerce by Permitting Fair Trade Contracts Establishing Resale Prices in States Having Fair Trade Acts Complying With Miller-Tydings Specifications.

The Miller-Tydings Amendment, in making workable our federal system of government, is akin to the wise cooperation in the Webb-Kenyon Act (27 U. S. C. A. 122), and in Public Act 15 (15 U. S. C. A. 1011).

This court had sustained the Illinois Fair Trade Act not as a price fixing act but as permitting price establishment, in contracts by trade-mark owners, in order to protect their good will in their trade-marks: *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183 (1936).

There is no federal common law: *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1939). The state is not impliedly impotent to permit fair trade contracts permitted by the Miller-Tydings Amendment when complying with Miller-Tydings specifications.

There is no regulation here except by Congress. The state does not "regulate" but merely permits contracts permitted by Miller-Tydings. These contracts by individuals

do not and could not "regulate" commerce, and they "affect" commerce as such, if at all, only indirectly and slightly. In another sense every contract between individuals affects interstate commerce, either directly or indirectly, by restricting the use of services, labor, capital or tangible property to a particular purpose, thus making them unavailable for other purposes. Even if regarded as state action, since the goods are fair-traded before being sold, regulation is "imposed before any operation of interstate commerce occurs": *Parker* v. *Brown*, 317 U. S. 341 (1942) (Stone, C. J.), and hence would be valid "however drastically it may affect commerce."

Without analysis or indeed much discussion the court below dismissed the Miller-Tydings Amendment (set forth in Appendix C herein) with the statement: "But the Miller-Tydings Act in no way, we think, affects any question of defendant's liability to plaintiff."

The pertinent part of the Miller-Tydings Amendment reads as follows:

> ". . . *nothing contained in sections 1-7 of this title shall render illegal*, contracts or *agreements prescribing minimum prices for the resale of a commodity which bears*, or the label or container of which bears, *the trade mark*, brand, or name *of the producer or distributor* of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, *when contracts or agreements* of that description are lawful *as applied to intrastate transactions, under any statute*, law or public policy now or hereafter in effect *in any* State, Territory, or the District of Columbia *in which such resale is to be made, or to which the commodity is to be transported for such resale, . . .*" (emphasis supplied).

As to purely intra-state transactions nothing in the Sherman Act could render them legal or illegal.

As to interstate sales, either the Congress has spoken or Congress has not spoken. If Congress has not spoken, then the Pennsylvania Fair Trade Act could be unconstitutional, as applied to interstate commerce, only because the Commerce Clause is self-executing and impliedly prohibits the interstate movement of goods having minimum resale prices under contracts permitted by state laws. This cannot be in respect of non-discriminatory acts permitting such contracts pursuant to policies deemed for the welfare of the state. But the Congress has spoken. By the Miller-Tydings Amendment, it has left not merely a void open for state action, but it has created a specific exception to the Sherman Act and its anti-trust policy. It has reversed the *Dr. Miles* case which held (Holmes dissenting) that price maintenance agreements of trade-marked goods *in interstate commerce* violated the Sherman Act. It has said that the prohibition of the Sherman Act shall not apply to fair trade contracts concerning trade-marked goods when permitted by state acts.

The repeal of a prohibition whether legislative or judicial is an effective expression of policy. The power of Congress over commerce and resale price maintenance therein arises under the Commerce Clause which gives Congress power to "regulate" commerce among the states. The Sherman Act was enacted under that clause and relates to interstate transactions only. That is the only way in which Congress has regulated that phase of interstate transactions.

The Congress is the policy-making power in the interstate field, and it has declared that the Sherman Act policy

shall not apply here. The doubt or the question as to constitutionality does not find sound basis in the question in the *Whitfield* case relied on by the court below. The Ohio indictment in the *Whitfield* case (297 U. S. 431 (1936)) had two counts: (a) one for shipping prison-made goods from the prison in Alabama to a person in Ohio, and the other (b) for the "open market" sale in Ohio of such prison-made goods. (The act prohibited (b) only.) It was as to (a) that the court (Sutherland, J.) expressed the constitutional question: and why not, making an Ohio crime out of a shipment *from* an *Alabama* prison? (And the doubt was dictum: the Ohio act did not apply at all.) But the court fully sustained (b), Ohio's power over what happened in Ohio, though the prison-made goods had come in interstate from Alabama; and fully sustained Congress' power so to permit Ohio, whether the goods were in the original package or no, and notwithstanding the previous immunity of goods while in the "original packages". The prohibitive provisions of the Ohio act were sustained as to goods in the original packages *because Congress had power to decide when* goods are in interstate commerce, and had elected to determine that prison-made goods were not in interstate commerce, though still in original packages.

By the Miller-Tydings Amendment, Congress opened the way for state fair trade acts to become effective before fair-traded goods are loaded for shipment across state lines. The doubts in the *Whitfield* case are far afield here. The parallel would be an Ohio statute forbidding shipments of prison-made goods *from Ohio*, or forbidding any sales (including interstate sales) of prison-made goods. In the case at bar, Pennsylvania dealt only with what was done in

Pennsylvania, in which state Respondent's sales, whether intra- or interstate, are initiated.

In the course of its opinion the Court of Appeals said, with reference to the Miller-Tydings Amendment:

> "This statute was much discussed by both parties at the argument. We think the statute was intended to relieve persons entering into contracts of the type provided for in these fair trade acts from liability under United States anti-trust laws. The legislation was necessary, if such immunity was to be had, because price maintenance agreements had previously been held to be a violation." (The *Dr. Miles* case).

This is completely illogical. The effect of the opinion is to construe contracts under state fair trade acts as purely intra-state in operation and effect. But the court concedes that fair trade contracts under state laws might involve Sherman Act violations (if there were no Miller-Tydings Amendment) notwithstanding that the Sherman Act applies only to interstate transactions. The court thus concedes that transactions under state fair trade acts do operate interstate, and do so legally by virtue of the Miller-Tydings Amendment.

Thus, apparently the court below was of the opinion that, insofar as trade-marked goods are concerned, the anti-trust laws are non-existent with respect to sales to or from a state having fair trade laws. That Petitioner might, with impunity, refuse to sell and get others not to sell the Respondent its trade-marked goods for resale, unless the latter signed a fair trade contract. (This is indicated by the fact that the court did not in its opinion mention the Respondent's counterclaim wherein he alleged the Petitioner, by allegedly trying to cut off his sources of supply, had vio-

lated the anti-trust laws.) But upon the dictum in *Whitfield*, the court below based its doubts as to constitutionality if the Miller-Tydings Amendment were given further effect than merely removing the Sherman Act ban, and dismissed that Act as having no further effect. In short, the court below said the Miller-Tydings Amendment has some interstate effect but not very much. This we submit led to grave error.

The Miller-Tydings Amendment was not a mere ordinary repealer. It did not merely carve a segment out of the Sherman Act, a safety island immune from the ban of the act.

It dealt with the border line (constantly crossed in national merchandising) between federal and state action, in order to make workable our dual system in that sphere.

Forty-two states at the time of enactment of the Miller-Tydings Amendment had fair trade acts (one had been sustained by this court):

*Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183 (1936) saying (194):

> "And good will is property in a very real sense injury to which . . . . is a proper subject for legislation"
>
> and a purchaser may "sell the commodity at any price he pleases" "provided he can do so without utilizing the good will of the latter as an aid to that end." (195).

Congress could have adopted a federal fair trade act. Hearings on such bills had been had: See 299 U. S. 190. But that would have been to coerce the states.

This court has treated the Miller-Tydings Amendment to the Serman Act as in effect a Federal "Fair Trade"

Act. In *U. S.* v. *Frankfort Distillers*, 324 U. S. 293 (1944) the defendants were indicted for violating the Sherman Act. In the course of his opinion sustaining the conviction Mr. Justice Black said, at page 296, 297:

> "The effect, and if it were material, the purpose of the combination charged, was to fix prices at an artificial level. Such combinations, affecting commerce among the states, tend to eliminate competition, and violate the Sherman Act per se. *United States* v. *Socony Vacuum Co.*, 310 U. S. 150, 223-224. Price maintenance contracts fall under the same ban, *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458, except as provided by the 1937 Miller-Tydings Amendment to the Sherman Act. 50 Stat. 693. The combination charged against respondents does not fall within this exception. It permits the seller of an article which bears his trade mark, brand, or name, to prescribe a minimum resale price by contract, if such contracts are lawful in the state where the resale is to be made and if the trade-marked article is in free and open competition with other articles of the same commodity. This type of 'Fair Trade' price maintenance contract is lawful in Colorado. Session Laws of Colorado, 1937, Chap. 146. But the Miller-Tydings Amendment to the Sherman Act does not permit combinations of businessmen to coerce others into making such contracts, and Colorado has not attempted to grant such permission. *Both the federal and state 'Fair Trade' Acts expressly provide that they shall not apply to price maintenance contracts among producers, wholesalers and competitors.* It follows that whatever may be the rights of an individual producer under the Miller-Tydings Amendment to make price maintenance contracts or to refuse to sell his goods to those who will not make such contracts, a combination to compel price maintenance in commerce among the states violates the Sherman Act." (Emphasis supplied.)

Congress took action essentially coöperative in its nature: it described the essential features of the existing fair trade acts and, in the exercise of its power to "regulate" commerce, said that the federal policy as to price maintenance contracts in general should not apply to agreements determining resale prices of trade-marked goods where favored by the policy of the state; i.e., that federal policy yielded to such state policy.

Congress must have acquiesced in the belief that the owner of a trade-mark is entitled to protection in his good will against unfair competition from price-cutters selling not merely an article of merchandise but a trade-marked article. Congress obviously approved the market-wise philosophy of the late Mr. Justice Brandeis* who so cogently set forth the wrong to the trade-mark owner and to the public in price-cutting of trade-marked goods. And forty-five states with the permission of Congress have adopted that philosophy.

Varying regulations of commerce have different effects which may give rise to sound distinctions as to the power of Congress and the states.

"Regulating" may mean out-and-out prohibition or qualified prohibition as in the case of stolen cars, or direct interference with movement across state lines, or indirect interference.

As to goods, "regulation" by Congress may take multitudinous forms, and as in the case of anti-trust statutes, may have no direct relation to the goods or their flow, but are intended to accomplish some desired end of public policy. Congress may prescribe or prohibit certain contracts or methods of merchandising. This purpose has no direct re-

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* See Appendix E, page 22a.

lation to the flow of commerce itself or to the extent thereof. It may or may not tend to increase or lessen such flow.

One of such indirect regulations, in order to accomplish a purpose deemed for the public welfare, is the Sherman Act. It does not ban goods; it bans contracts "in restraint of trade" as to goods in interstate commerce. This may tend to increase or decrease the flow of goods across state lines. But that is immaterial, it's the general welfare or the proper objective that counts; not the extent of the traffic.

Just as Congress may attain its anti-trust objective, irrespective of its effect upon volume of traffic, so it may permit the states, in order to attain another general welfare objective, to do justice to the owners of trade-marks and permit orderly and non-discriminatory price structures without haggling or cutthroat price-cutting, to have their own policy as to that segment of contracts affecting commerce and to give the states freedom to permit contracts previously dealt with by the Sherman Act. In a nutshell, Congress may permit free-trade in fair-traded goods across as well as within state lines, and freedom of contract to determining resale prices on one's own trade-marked goods.

2. STATE FAIR TRADE ACTS, SUCH AS PENNSYLVANIA'S, ARE CONSTITUTIONAL, WHETHER

(a) *as an invited interlocking with the Miller-Tydings Amendment, or*

(b) *viewed merely as occupying territory abandoned by Congress, or*

(c) *as if the pre-Sherman Act conditions were restored and thus merely indirectly affecting, not regulating, interstate commerce, or*

(d) *as if irrespective of where title passes, the "sales" take place in Pennsylvania, where respondent lives, where he receives and accepts orders and cash and stores and ships fair-traded Sunbeam razors.*

(a) *"As an invited interlocking with the Miller-Tydings Amendment."* That Congress recognized existing state action and invited like state action has been shown from the federal standpoint.

Now for the state point of view: Pennsylvania was one of the 42 pre-Miller-Tydings states. It amended its fair trade act, which was in effect a reenactment of the entire act. (The pertinent provisions of said act are set forth in Appendix "D", page 21a.) (No reenactment was necessary: *Wilkerson* v. *Rahrer*, 140 U. S. 545, 565 (1891).)

Congress' description carried with it a requirement for non-discriminatory action. There is no suggestion that the Pennsylvania Act does not fully comply with the Miller-Tydings requirements, or indeed, in the dissecting of irrelevant differences, that any of the forty-five states fair trade acts does not fulfill the Miller-Tydings specifications. Accordingly Pennsylvania "permits the designated private

persons to contract with respect thereto:" *Old Dearborn* v. *Seagram*, 299 U. S. 183, 192 (1936), *and requires all persons having notice of the contract to refrain from any conduct which would impair or destroy it.*

(b) *"Viewed merely as occupying territory abandoned by Congress"* or

(c) *"As if the pre-Sherman Act conditions were restored. . . .*

*There must be significance in Congress'* action in occupying and then partially evacuating. In 1890 Congress adopted a new federal policy regarded as revolutionary. Under the power to "regulate commerce" it dealt with contracts "in restraint of trade" in respect of goods crossing state lines. Came the *Dr. Miles Medical* case, 220 U. S. 373 (1911) and contracts fixing the resale prices of trademarked goods were construed to be "in restraint of trade". Then in 1937 came Miller-Tydings, not giving permission to *all* such contracts but *only those in states having fair-trade acts of a designated sort.*

The significance of the Congressional departure from the Sherman Act, by its adoption of Miller-Tydings, was that at the time there were already in existence fair trade acts in 42 states. Congress would deal only with things affecting interstate commerce.

The court below has raised the ante- '90 spectre as though pre-Sherman Act were restored. We quote:

> "But the Miller-Tydings Act in no way, we think, affects any question of defendant's liability to plaintiff."

However, the court had just conceded that Miller-Tydings had put the quietus on the Sherman Act as regards

"*contracts of the type provided for in these fair trade laws.*" But as "affects any question of defendant's liability to plaintiff", we are told by the Court of Appeals, between the commerce clause (Congress shall have power to . . . regulate) and the Fair Trade Act (trade-mark owners may make fair trade contracts), there is grave danger of a constitutional collision if those fair-traded goods cross state lines; so the fair-trade contracts must be restricted to home state use only. This assumes that fair trade acts constitute state regulation notwithstanding that this court said in the *Seagram* case, 299 U. S. 183 (1936), that the (Illinois) act "does not attempt to fix prices, nor does it delegate such power to private persons. It permits the designated private persons to contract with respect thereto. It contains no element of compulsion . . ."

To "regulate" in the commerce clause means to regulate by legislative action:

> "The power to regulate commerce, vested in congress, is the power to foster, protect and control commerce, to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted, to determine when it shall be free, and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged." *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215 (1884).

The manifest vice of the opinion below is that its entire ratio decidendi assumes that the fair trade act *regulates*. The court below relied upon the decision in *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945) striking down

an Arizona law *fixing* the length of all passenger and freight trains. Then it proceeded to regard the Pennsylvania Fair Trade Act as though it similarly constituted direct state regulation. The application of the assumption appears from the opinion as follows:

> ". . . in the absence of an occupation of the field by Congress a *state may regulate* some aspects of interstate commerce."
>
> ". . . even in the absence of Congressional action the commerce clause is a limitation of the *power of the states to regulate* interstate *commerce.* A state may not regulate . . ."
>
> ". . . the protection of interstate trade against *state interference.*" (Emphasis supplied).
>
> ". . . the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference."

The court below belabors the straw man of state regulation, *when there is no state regulation:*

> "Further, if a state may *regulate* the price at which an article must be sold if it is to be shipped out of the state, may it not *equally well regulate* the price for which the article must *have been sold before it is allowed to come* into the state?" (Emphasis supplied.)

(Of course the fair trade act permits no such contracts.) On the other hand, this court has said a fair trade act is not a price-fixing act: *Old Dearborn* v. *Seagram*, 299 U. S. 183, 192 (1936). Indeed a price-fixing act would be invalid: *Commonwealth* v. *Zasloff*, 338 Pa. 457, 13 Atl. 2d, 67 (1940).

So the "grave constitutional difficulties" which result (a) in condemning the states to implied impotency to father

effective fair trade acts and (b) in emasculating the Pennsylvania Act may be dismissed as baseless.

The fair trade system is not considered as a state regulation of commerce, but rather as a limitation upon what Congress regards as excesses of competition. Mr. Justice Reed, in his dissenting opinion in the case of *Standard Oil Co.* v. *F. T. C.*, — U. S.: —, p. — said:

> "The public policy of the United States fosters the free enterprise system of unfettered competition among producers and distributors of goods as the accepted method to put those goods into the hands of all consumers at the least expense. There are, however, statutory exceptions to such unlimited competition.[4]
>
> "4. E. G., Interstate Commerce Act, Section 5, 49 U. S. C. Section 5; Communications Act of 1934, Section 221, 47 U. S. C. Section 221; *Miller-Tydings Act*, 15 U. S. C. Section 1, and C. Mason, 'The current status of the monopoly problem in the United States', 62 Harv. L. Rev. 1265." (Emphasis supplied.)

The minimum wage law may also be regarded as Congressional limitation in the excesses of competition.

Moreover, the fair trade acts are not mandatory, they are permissive only. The state fixes no prices; it merely permits, but does not require, a manufacturer of a commodity bearing a trade-mark to fix a minimum resale price to consumers by contracts. A standard of equal competition is thereby established among all dealers handling the trade-marked product and *relying upon that trade-mark to enable them to sell the product.* It is a well-known fact, however, that many manufacturers, particularly those making more expensive appliances, suggest but do not fix, resale prices. Where manufacturers see fit to take advantage of

the fair trade acts, it is the contract they make with the retailers that establishes the minimum price.

Upon the assumption that the State of Pennsylvania and the other 44 states having fair trade acts "fix" prices, the court below founded its "grave constitutional difficulty" based upon a hypothetical illustration of a non-uniform retail price in different states. This is contrary to the fact and contrary to the reasonable inference from the record facts. An important and far reaching ruling ought to be based upon facts, not upon what might happen.

(d) *"As if irrespective of where title passes, the "sales" take place in Pennsylvania, where Respondent lives, where he receives and accepts orders and cash, and stores and ships fair-traded Sunbeam razors."* Local law should apply in a matter primarily within the state jurisdiction as to the conduct of citizens within the borders of the state, even though such conduct may affect at a later point goods crossing state lines. The state should have power by non-discriminatory laws to make its policy effective upon its citizens. A state's anti-trust laws should be uniformly binding upon its own citizens until Congress regulates the interstate sphere. So also to state laws concerning contracts, including fair trade contracts made within the state. The sales of the fair-traded goods should be regarded as being made in Pennsylvania. At some time in the correspondence, after the order is received in Pennsylvania, and before the shipment of the razor, there is a meeting of the minds. A contract takes place. That is a contract of sale irrespective of terms thought up to secure a supposed interstate immunity from Pennsylvania law. The rights of the states should be respected.

The Pennsylvania Fair Trade Act is applicable to Respondent's sales regardless of where title passes.

While the Court of Appeals did not think the point important, the Respondent both in that court and in the District Court argued at length that the Pennsylvania Fair Trade Act did not apply to him because he sold in such a way that technical title to the Shavemasters in question may have passed to the customer in other states.

The Respondent is a citizen and inhabitant of Pennsylvania. There originates his national advertising and offering for sale (which circulates in Pennsylvania, as well as elsewhere) and there he receives and accepts the orders and the cash. There are stored and from there are shipped the fair-traded Shavemasters. All the transactions in connection with Respondent's mail-order business, including entering into the contracts pursuant to which the fair-traded goods are shipped, are made in Pennsylvania. Pennsylvania and Pennsylvania alone has jurisdiction over Respondent and his course of conduct within that Commonwealth. The Pennsylvania Fair Trade Act is general in its language and plainly applies to Respondent's business.

Petitioner's fair-trade contracts are "contracts relating to the sale or resale" of a trade-marked commodity within the meaning of the Fair Trade Act. They are general and unrestricted in their terms. Respondent persisted after repeated notices that "Sunbeam" and "Shavemaster" had been fair-traded. That under the Act was unfair competition. It was unfair competition in all states having fair trade laws. It was an attack upon and impairment of Petitioner's Pennsylvania contract, as well as its contracts in all fair trade states. The Act validly applies irrespective of

the terms of shipment allegedly contained in Respondent's contracts, *all of which were made in Pennsylvania.*

The validity of a contract, with respect to legality, depends upon the place of contracting: *Restatement of Conflict of Laws*, Sec. 332 (e); and see *Goodrich on Conflict of Laws*, Sec. 107, wherein it is stated that the better rule is that the situs of the contract governs as to its validity. Under the law of Pennsylvania the Respondent's offer and agreement to sell at less than fair trade prices violated Pennsylvania's Fair Trade Act and Petitioner's contract thereunder, was unfair competition and illegal.

The difficulty labored by Respondent arises from attempting to narrow the meaning of "sale" to the passing of title and hence to the consummation by delivery. An executory sale is a binding contract to sell and as much a "sale" in customary parlance whether it be consummated f.o.b. Palmyra, Pa. or Palmyra, N. Y. A house is offered for sale by a "FOR SALE" sign which is often replaced by a "SOLD" sign before the property is paid for and deed delivered.

It is unthinkable that Congress or the Pennsylvania legislature meant that technical and sometimes shadowy rules of the laws of sales as to when legal title passes should determine whether a retail resale was interstate commerce or not. (As an example of this shadowy line as to passage of title compare Pennsylvania Statute 69 P. S. 143, Rule 5, with, *Commonwealth* v. *Wiloil Corporation*, 316 Pa. 33, aff'd 294 U. S. 169 (1934) and *W. G. Ward Co.* v. *American Lumber & Manufacturing Co.*, 247 Pa. 267 (1915). While this distinction may be invoked to prevent the state in which goods are delivered across state boundaries from asserting that the consignor is doing taxable business notwithstand-

ing that all sales are made f.o.b. point of shipment it is obvious that the effect upon interstate commerce, if any, does not vary according to whether a sale is f.o.b. or C.O.D. The point is not as the court below seemed to think whether one is interstate commerce and the other not—the real "commerce" in either case is the transit of the goods. The price maintenance clause is not commerce, though it may be said to "affect" it. The price maintenance clause is effective before any shipment takes place whether f.o.b. or C.O.D. The shipment from a point in Pennsylvania at a cut-price in violation of the state policy completes the tort. Regardless of the technical form of the sale, the state should not be powerless to enforce the contractual policies permitted by its legislation.

3. THE DECISION BELOW, IF PERMITTED TO STAND, WILL EFFECTIVELY NULLIFY THE FAIR TRADE ACTS OF FORTY-FIVE STATES AND THE PUBLIC POLICY EMBODIED THEREIN, TO THE GREAT INJURY OF MANUFACTURERS, RETAILERS AND THE PUBLIC.

Statutes should be construed by courts so as to make them fully effective, except when they are clearly unconstitutional. In the actual economic environment in which fair trade laws operate, interstate application is required to make them fully effective.

Limiting fair trade acts to intrastate application repeals them for all practical purposes.

In his brief below, Respondent argued that the fair trade laws were merely a depression measure of the 1930's to combat falling prices, price wars, cut-throat competition among retailers and the problem of "loss leaders". The Circuit Court apparently was taken with this argument and in its opinion says:

> "The local cut price sale with a loss leader feature, which seems to have constituted a much stressed argument for the legislation, is adequately cared for in giving the statute a local application only."

The Court of Appeals totally ignores the reality that all national magazines and the advertisements therein are read locally, are intended to, and do have local effect.

The Respondent argued below that he is not selling "loss leaders" and since he has no store, in the usual sense, in Palmyra, Pa., he is not competing with local merchants. The simple fact of the matter is that Respondent, taking advantage of the existence of an established price under the fair trade law and to the disadvantage of law-abiding re-

tailers, *sells nothing but loss leaders.* He competes with retailers in Palmyra, in Harrisburg and in Philadelphia. He, by his unlawful advertisements, competes with each of Plaintiff's 70,000 dealers throughout the country. He violates and impairs fair trade contacts authorized by the legislative policy of 45 states.

Obviously, advertising of cut prices on a national scale does more harm to the goodwill attached to Petitioner's trade-marks than does the most flagrant violation carried out at a local level. In the case at bar, dealers from eight states complained to Petitioner of Respondent's unfair competition. But, the court below says in effect that Respondent can continue such advertising, using Petitioner's trade-marks, so long as he adds a clause in his national advertising: "This doesn't apply in Pennsylvania". Also the court intimates if Respondent so chooses he can rent another second floor bedroom across the river from Philadelphia, in Camden, New Jersey, and advertise in the Pennsylvania papers:

> "Shavemasters for sale at $17.50, mail and phone orders accepted here, your purchase will be mailed to you C.O.D. in Pennsylvania."

Since the Pennsylvania dealer cannot sell the product at the fair trade price when his customer knows he can obtain it from Respondent, or some other mail order dealer, at a lesser price, the local dealer is forced to abandon the fair trade price. No court of equity will enjoin him; such an injunction would put the local dealer out of business. The court will be obliged to hold that there is no equitably enforceable price structure. What then happens to the Circuit Court's opinion that local price cutting "is adequately

cared for in giving the statute local application only"? Petitioner respectfully submits that the learned court's opinion is an economic impossibility.

*Either the Fair Trade statutes apply interstate as well as locally, or they don't apply at all,* and must be considered dead letters upon the statute books.

The Court of Appeals set up an economic straw man theory of what might happen under fair trade laws. It invented a hypothetical example, in no way justified or supported by the record in the case, or by the actualities of business, to attempt to prove that interstate application of the fair trade acts would create unconstitutional trade barriers. In setting up its hypothetical economic never-never land, the court said:

> "There is no [specific] requirement that the established fair trade price be uniform throughout the states. Thus we have the possibility of a situation where, for instance, the fair trade price of an article has been fixed in Pennsylvania at $1.00 and in South Carolina at 75¢. If the Pennsylvania statute is permitted to govern interstate sales, no sales in that commodity can be made by Pennsylvania sellers to South Carolina buyers. If the Pennsylvania seller were to meet the competition of South Carolina sellers, he would commit a tort in Pennsylvania, and yet he would be selling at the very price set in South Carolina as "fair trade". Further, if a state may regulate the price at which an article must be sold if it is to be shipped out of the state, may it not equally well regulate the price for which the article must have been sold before it is allowed to come into the state? Tariff barriers are but feeble obstacles compared with such a blockade on the interstate movement of goods."

Petitioner's prices are in fact uniform throughout all the forty-five fair trade states. Prices are established by Petitioner's Executive Committee and are listed in a supplement circulated to the trade. When there is a price change, as for instance when a new model is introduced, a new supplement is issued, applying under contracts in all of those states. As appears from the deposition of Petitioner's Vice President "a supplement" is published, not two, or three, or 45 different supplements.

Implicit in the fair trade act is the requirement that the minimum resale price established be uniform in any one competitive area. *Calvert Distillers Corp.* v. *Nussbaum Liquor Store, Inc.*, and *Seagram-Distillers Corp.* v. *Same*, 166 Misc. 342, 2 NYS (2d) 320 (1938), *Hutzler Bros. Co.* v. *Remington Putnam Co.*, 186 Md. 210, 46 A. (2d) 101 (1946).

Because of the existence of national chain stores and mail order houses, as well as because of advertising in nationally circulated periodicals, and radio and television broadcasting, the entire country is one competitive area with respect to all nationally distributed trade-marked merchandise.

The great influence which chain stores and mail order houses (now licensed to price-cut by the opinion below) exert in the retailing field is shown by the fact that total retail sales of chain stores and mail order houses in 1949 were one-fifth of all retail business, namely, $27,188,000,000, out of the aggregate retail sales of all retail stores whatsoever in the amount of $128,183,000,000. (and in such figures catalogue business only is shown as mail order; sales of retail stores owned by general merchandise mail order companies being included in statistics with department

and other stores). See Tables 1052 and 1042, pages 901 and 891, respectively, of the *Statistical Abstract of the United States*, 1950."

Added to the impact of the mail order stores, there should be considered the interstate impact of the great department stores found in all of the large cities throughout the United States, each of which attract customers far beyond the borders of the state in which they are located and many of whom advertise in magazines and periodicals of national circulation.

There is no such thing in the United States as a purely local, segregated, walled-in market limited to the boundaries of a particular state with respect to nationally advertised merchandise known by a distinctive trade-mark. There is only one market and that is the entire country.

It follows by reason of economic necessity that the manufacturer who distributes his product in the national market under a distinctive trade-mark, by means of continuous and heavy national advertising (such as Petitioner does) is compelled to set one single, uniform price. If the manufacturer attempted to establish different prices in different states, no court would, or could, in equity and good conscience enjoin any dealer under the fair trade laws from meeting the lowest price set. In fact, under the law which has now accumulated under the fair trade statutes, it is plain that if different prices were permitted any court would be obliged to rule that the manufacturer had failed to establish a bona fide fair trade price structure under the fair trade acts, or that, in any event, such a structure was unenforceable.

If Respondent can without permission (in fact contrary to the expressed wish of the manufacturer) advertise

the trade-mark of Petitioner to destroy it's price structure, then the value of that trade-mark is substantially destroyed. If Respondent can avail himself, without cost, of the retailing function of constant local display and demonstration of the product, which the legitimate local retailer has already performed, and is constantly performing, then the local retailer cannot afford to handle the product. Such predatory and parasitic transactions are precisely what the court below has authorized.

In Section 33, relating to "Distribution and Services", of the *Statistical Abstract of the United States* (1950), it is clearly shown that a great percentage of the distribution of goods at the retail level in the United States is controlled by comparatively few stores. Table 1046, page 893, based on the 1939 census (the last census figures presently available), reveals the following: There were a total of 1,770,355 retail stores; those employing 100 or more employees numbered one-tenth of 1% of the total number of stores, *yet they did 11% of the entire retail business.* Stores employing six or more employees constituted approximately 9.6% of all the stores in the United States, yet they did approximately 54.2% of the total sales in 1939. There is no reason to believe that the 1949 census will show a reversal of such concentration of power.

It is obvious that with respect to durable goods (such as Petitioners) of which the consumer normally buys only one unit at intervals of several years or more apart, the 90.4% of the small stores hiring five or less employees cannot possibly stay in competition with the remaining 9.6% on such nationally advertised merchandise unless there is a uniformity of price. In a price war, the large units can always operate more economically and can even handle

trade-marked merchandise at cost in order to attract people into their stores; in either event the small units will inevitably be pushed out of the market.

Ironically, if Respondent's views prevail, his mail order customers will have no established national price against which to decide whether or not Respondent's offer is a bargain. Or, if another mail order house advertises the Shavemaster at cost, as an inducement to get customers, who would be foolish enough to pay Respondent anything higher? If the Court of Appeals is sustained, Respondent, sooner or later, will perceive that he has won a Pyrrhic victory!

Not only would Respondent suffer a Pyrrhic victory, but Petitioner, its wholesale distributors, its 70,000 retailers, and the public would suffer because large scale mass production, with the consequently lower price to the general public, can only be scheduled on the basis that there are many stores throughout the United States each stocking and actively engaged in selling the manufacturer's products. Once the remaining portion of the retail market gravitates into the hands of a tiny percentage of all of the stores, such widespread distribution of a manufacturer's product becomes impossible and there is no longer any nationally advertised price standards to serve as a competitive check on prices charged by the big stores on their private and unknown brand goods. The manufacturer himself is then reduced to being a supplier to a few big stores and mail order houses, and in order to survive must meet specifications as cheaply as possible. Whereas, when he manufacturers under his own trade-mark his competitive incentive is constantly to produce a finer article.

*Contrary to the opinion of the court below, it is clear that fair trade acts are not barriers to trade and commerce.*

*They aid and increase the flow of commerce by fostering effective competition to the great power concentrated in a few large stores, chains and mail order houses.*

The decree of the District Court did not interfere with interstate commerce; it merely interfered with Respondent's price-cutting activities. Respondent's price-cutting is only possible because he advertises "Shavemaster" and operates with none of the legitimate retailer's usual overhead. Mass merchandising is not practical if so confined. Furthermore, if Respondent and others can avail themselves, without cost, not only of Petitioner's trade-mark and goodwill, but of the retailing function of constant local display, demonstration and availability of the product, which the legitimate local retailer has already performed and is constantly performing, then the local retailer cannot recover his costs and cannot afford to handle the product.

Price cutters reap where they have not sown. And in so reaping they may erode and make barren the field.

Such predatory conduct by Respondent should not be tolerated. In *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 193 (1936), this court said in dealing with a nonsigner, having knowledge of fair trade contracts:

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, *upon every principle of fair dealing*, assent to the protective restriction, with consequent liability under Sec. 2 of the law

by which such acquisition was conditioned." (Emphasis supplied).

Mr. Justice Brandeis, as quoted in Alfred Lief's book "The Brandeis Guide to the Modern World", had the following to say with respect to the dealer's right to cut prices (see Appendix E):

> "If a dealer is selling unknown goods or goods under his own name, he alone should set the price; but when a dealer has to use somebody else's name or brand in order to sell goods, then the owner of that name or brand has an interest which should be respected. The transaction is essentially one between the two principals—the maker and the user. All others are middlemen or agents; for the product is not really sold until it has been bought by the consumer.
>
> "Why should one middleman have the power to depreciate in the public mind the value of the maker's brand and render it unprofitable not only for the maker but for other middlemen? Why should one middleman be allowed to indulge in a practice of price-cutting, which tends to drive the maker's goods out of the market and in the end interferes with people getting the goods at all?"

Mr. Justice Holmes in his dissenting opinion in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911) at 412, more forcefully expressed the same thought and said:

> "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not destroy, the production and sale of articles which it assumed to be desirable that the public should be able to get."

The Miller-Tydings Act is congressional recognition of the soundness of Mr. Justice Holmes' economics.

It is respectfully submitted that Judge Follmer of the District Court was well supported by authority when he said, in his opinion:

> "As stated in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra, even though this plaintiff parted with the ownership of the six shavers involved in this case, it did not part with the good will that it had at great expense built up around the trade-mark name of those razors, namely, 'Sunbeam' and 'Shavemaster'. This defendant did not advertise merely a razor for sale, he advertised a 'Shavemaster' electric razor. By so doing he has invaded a right that this plaintiff has been given by the Fair Trade Act of the Commonwealth of Pennsylvania in respect to a sale made under the terms of that Act and that trade-mark must be kept inviolate whether the sale is intrastate or interstate."

It is respectfully submitted that a writ of certiorari should issue to the Court of Appeals for the Third Circuit as prayed for in the annexed petition.

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# APPENDIX A

## Opinion of the District Court

This is a suit for injunctive relief and damages under the Fair Trade Act of the Commonwealth of Pennsylvania, approved June 5, 1935, P. L. 266, as amended June 12, 1941, P. L. 128.

The title to the said Act reads as follows:

> "To protect trade-mark owners, distributors, and the public against injuries and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name."

The pertinent portion of the Act, as amended, provides as follows (73 PS 7 and 8):

> "No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to the consumers bears the trade-mark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:
>
> "(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.
>
> "(b) That the buyer of such commodity require upon his resale of such commodity that the purchaser from him agree that such purchaser will not in turn resell except at the price stipulated by the vendor of the buyer.
>
> "Such provisions in any contract shall be deemed to contain or imply conditions that such commodities

may be resold without reference to such agreement in the following cases:

"(a) In closing out the owners stock for the purpose of discontinuing delivering any such commodity.

"(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof.

"(c) By any officer acting under orders of any court or in the execution of any writ or distress."

"Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity."

This Act must be read in connection with Section 1 of the Sherman Act, as amended by the addition of the two proviso clauses known as the Miller-Tydings Amendment (July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693 (15 U.S.C.A. 1)). This Act as so amended reads as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or

public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: Provided Further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The plaintiff, the manufacturer of a trade-marked product known as "Sunbeam Shavemaster," pleads diversity of citizenship with defendant and bases its claim of the existence of the required jurisdictional amount on the statement that its good will, under certain lawful contracts and its rights under the Pennsylvania Fair Trade Act aforesaid, is in excess of $10,000.00.

Plaintiff further avers that the said Sunbeam Shavemaster is in fair and open competition with commodities of the same general class produced by others; that it is the sole owner of said trade-mark; that the said trade-marked article has a good reputation among wholesalers and retailers and with the public generally; that it has been widely advertised throughout the United States in many nationally distributed publications; that an extremely valuable good

will as a consequence of said advertising and of the intrinsic merit of the product attaches to the said article and its trade-mark; that said article has been and now is sold and distributed throughout the State of Pennsylvania and plaintiff enjoys a good business therefrom; that plaintiff has entered into a number of retail contracts with retailers doing business in the State of Pennsylvania, and attached to the complaint are copies of the said contracts and Fair Trade Price Lists.

Plaintiff also avers that defendant has been guilty of unfair competition in that it has violated plaintiff's minimum retail price agreements; that he has by advertisement in various publications offered to sell the said trade-marked article at a price less than plaintiff's fair trade price; [1] that plaintiff on several occasions wrote to defendant informing him that its products were sold under the Fair Trade Act of Pennsylvania and requesting defendant to desist from offering for sale or selling said trade-marked article for less than the fair trade price; that plaintiff has received numerous complaints from retailers of its products throughout the country protesting against defendant's cut price advertising; that notwithstanding repeated notifications, defendant wilfully continued to offer for sale and to sell plaintiff's trade-marked Sunbeam Shavemaster at a price of $17.25 still knowing that the fair trade price thereof was $23.50.

Plaintiff finally alleges that such unfair competition on the part of defendant has caused plaintiff great monetary damage and that it has no adequate remedy at law unless

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[1] Paragraph V of the complaint states, inter alia,

". . . On Page 83 of 'The American Rifleman' for May, 1948, the defendant inserted the following advertisement:

'SCHICK SUPER ELECTRIC SHAVERS
$13.00, Remington Foursome
$14.00, Shavemaster $17.25,
new, latest models. S. A.
Wentling, Palmyra, Penna.'"

defendant is enjoined from further acts of unfair competition.

An answer was filed by the defendant wherein he admitted substantially all of the allegations of the complaint, excepting that he denied that his advertisements constituted offers to sell; denied the jurisdiction of this Court; denied that there was any good will attached to plaintiff's trademark, and finally, for multifarious reasons denied the constitutionality of the Pennsylvania Fair Trade Act. Defendant further filed a counterclaim for damage to his business on the theory that plaintiff's assertion of right under the Pennsylvania Fair Trade Act was contrary to the Sherman Antitrust Act.

Subsequently thereto, and after due notice to defendant, plaintiff took the deposition of Edward K. Ploner, plaintiff's Vice-President. After the filing of the deposition, plaintiff moved for summary judgment under Rule 56, Federal Rules of Civil Procedure, which motion is presently before the Court.

Mr. Ploner in his deposition avers, among other things, that the method of sale and distribution followed by plaintiff is through approximately eight hundred wholesale distributors who, in turn, sell to upward of seventy thousand retailers throughout the entire United States; that its advertising is in national magazines, local newspapers and television; that the company's approximate sales of shavers for 1946 were $1,925,000.00; in 1947, $4,057,000.00; in 1948, $5,863,000.00, and in the first six months of 1949, $1,847,000.00; that the diminishing sales in 1949 were attributable to the fact the company stayed out of the market for about five months to give their distributors, wholesale and retail, an opportunity to reduce their stock of an old model when a new model was introduced; that the company spent in direct advertising of the Shavemaster in 1946 approximately $98,000.00; in 1947, $250,000.00; in 1948, $354,000.00, and the first six months of 1949, $140,-

000.00; that when a new model is introduced to company issues a supplement to outstanding Fair Trade contracts in which prices are quoted and the effective date given; that following defendant's advertising the company received complaints from wholesale and retail distributors in Wisconsin, California, Maryland, Delaware, District of Columbia, Pennsylvania, Illinois, Minnesota and Nebraska; that the total sales of Shavemaster in Pennsylvania in 1948 was approximately $420,000.00; that in 1948 the company had about fifty wholesale and seventy-three hundred retail distributors in Pennsylvania; that unchecked violations of Fair Trade prices are detrimental to the sale of trademarked merchandice.

Thereafter, defendant filed an affidavit setting forth, inter alia, that he never saw any executed contract between plaintiff and any retailer, or the price list shown in Exhibit "A" of the complaint, prior to service of complaint on him; that he did not use the Shavemaster as a loss-leader, and was never notified by plaintiff of the discontinuance of or change in price of Shavemaster.

The complaint avers that following the May, 1948, advertisement in "The American Rifleman" plaintiff on June 8, 1948, wrote defendant as above indicated and attached to this letter two copies of its Pennsylvania Fair Trade Contract, as well as a retail price list, and invited defendant to sign both copies, return to plaintiff after which it would execute a copy and return to defendant and thus include him as one of its cooperating dealers. Defendant continued to advertise as before, whereupon plaintiff again wrote defendant on June 24, 1948, July 23, 1948, and March 4, 1949, and on the latter date by telephone conversation through its counsel again reiterating all that had previously been written. These averments are either admitted or not denied in the answer. The advertisements continued through Novmber, 1948.

In his affidavit defendant avers,

"2. That he denies ever having seen any executed contract between the Sunbeam Corporation and any retailer prior to service upon him of the complaint.

"3. That he denies ever having seen the price list shown in Exhibit 'A' of the complaint before said complaint was served on him."

The copies of plaintiff's Pennsylvania Fair Trade contracts attached to the complaint as Exhibit "A" purport to be copies of executed contracts. Defendant in his affidavit admits receiving an unexecuted copy of the identical form.

The copy of the price list attached to the complaint as part of Exhibit "A", being the letter and exhibits referred to therein, which letter defendant in paragraph VI of his answer admits having been forwarded to him, is printed on white paper and quotes prices effective July 5, 1948. Defendant in his affidavit denies the receipt of this price list, but in his answer he admitted the mailing of the letter which referred to the price list and admitted the receipt of a price list printed on yellow paper and which carried the date of April, 1948. Both lists quote the Shavemaster as Cat. No. "3" at $23.50.

From the pleadings, deposition and affidavit there is, in my opinion, no genuine issue as to any material fact.

We have here in the plaintiff the owner of two trademarks, namely, "Sunbeam" and "Shavemaster"; that it advertised and distributed a shaver under those two trademarks; that it entered into Fair Trade contracts with retailers in Pennsylvania under the provisions of Pennsylvania Fair Trade Act; that defendant with knowledge of outstanding Fair Trade contracts in Pennsylvania and price lists in connection therewith, advertised and sold six Shavemasters for $17.25 each when the listed Fair Trade price was $23.50; that said advertisement specifically used the trade-marked name of "Shavemaster." There is no question

but that this plaintiff has at a tremendous expense built up a good will for its trade-marked products.

I see no merit in defendant's captious complaints about his lack of knowledge. He admits receiving a copy of plaintiff's blank form Pennsylvania Fair Trade contract. He complains he did not see an executed copy thereof. I find nothing in the Act to indicate that defendant would be entitled to a copy of an executed contract. He was given a copy of the form of contract used in Pennsylvania and he was told that it was such. That was sufficient notice.[2]

Whether the copy of the price list attached to the complaint giving the effective date as of July 5, 1948, is or is not the same as defendant admits receiving and which was dated April, 1948, is entirely aside from the point. The fact remains both carried the only item we are here concerned with, with the same catalogue number and same price.

Finally, the defendant complains that he was not advised of subsequent price lists. So far as the record goes, the price of this article remained constant throughout the period covered by defendant's advertisements. The objection is therefore without merit.

In Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183, the court had before it Sections 1 and 2 of the Illinois Fair Trade Act (Smith-Hurd Rev. Stat., 1935, Ill., c. 121½, Sections 186 and 189) which at that time was substantially the same as Sections 1 and 2 of the Pennsylvania Act. In holding that the Illinois Act was not in violation of the Fourteenth Amendment to the Constitution of the United States, the court stated, inter alia,

> "In the second place, §2 does not deal with the restriction upon the sale of the commodity qua com-

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[2] In Bristol-Myers Co. v. Lit Brothers, Inc., 336 Pa. 81, the court quoted a finding by the chancellor as follows:

> "'That after defendant had notice * * * that plaintiff had entered into contract with others fixing the resale price of plaintiff's products, it always sold Ipana Tooth Paste * * * and Sal Hepatica * * * at the resale prices fixed by plaintiff in contracts with others';"

modity, but with that restriction because the commodity is identified by the trade-mark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.

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"* * * Section 2 of the act does not prevent a purchased of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition.' * * *

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. * * *"

I find no merit in any of the defendant's many reasons advanced in an effort to prove that the Pennsylvania Fair Trade Act is in violation of the Constitution of the United States or the Constitution of the Commonwealth of Pennsylvania.

As stated in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra, even though this plaintiff parted with the ownership of the six shavers involved in this case,

it did not part with the good will that it had at great expense built up around the trade-mark name of those razors, namely, "Sunbeam" and "Shavemaster." This defendant did not advertise merely a razor for sale, he advertised a "Shavemaster" electric razor. By so doing he has invaded a right that this plaintiff has been given by the Fair Trade Act of the Commonwealth of Pennsylvania in respect to a sale made under the terms of that Act and that trade-mark must be kept inviolate whether the sale is intrastate or interstate.

It is true the Pennsylvania Supreme Court has never passed upon the constitutionality of the Pennsylvania Fair Trade Act; on the other hand, it has not hesitated to construe and enforce the Act.[3]

In a very well considered opinion in Pepsodent Co. v. Krauss Co., Limited, (D.C.E.D. La.) 56 F. Supp. 922, Judge Borah stated, "The history of the legislation leaves no doubt that Congress enacted the Miller-Tydings amendment with full knowledge of the provisions in state fair trade acts making resale price maintenance effective against non-contracting retailers, and that it was the design and intention of Congress to remove every obstacle which would hinder the free enforcement by the states of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit."

Congress has spoken and the legislature of Pennsylvania has spoken and there is no doubt in my mind what was the legislative intent in both instances. As to the wisdom of such legislation, we are not here concerned. As indicated above, I find nothing in the legislation violative of either the Constitution of the United States nor that of

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[3] Lentheric, Inc. v. F. W. Woolworth Co., 338 Pa. 523; Bristol-Myers Company v. Lit Brothers, Inc., 336 Pa. 81. In the latter case the court held that the peculiar facts of the case did not of themselves amount to such unfair competition as the Fair Trade Law forbids. Under the circumstances I feel that Shipman, et al. v. DuPre, 94 L. Ed. 587, has no application here

the Commonwealth of Pennsylvania.[4] All of the jurisdictional requirements are present here.

I am, therefore, of the opinion that the admitted acts of the defendant in cutting the price of plaintiff's trademarked product are in direct violation of the Fair Trade Act of the Commonwealth of Pennsylvania; that the actions of the defendant threaten irreparable damage to the plaintiff;[5] that the plaintiff has no adequate remedy at law and is entitled to the injunctive process of this Court for its protection. A decree for permanent injunction is being filed contemporaneously with this opinion.

June 10, 1950

(s) FREDERICK V. FOLLMER,

*United States District Judge.*

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[4] For a very able discussion of the constitutionality of a Fair Trade Act of the State of South Carolina similar to that of the Commonwealth of Pennsylvania, see Miles Laboratories, Inc. v. Seignious (D.C.E.D. S.C.) 30 F. Supp. 549.

[5] Apropos of the propriety of injunctive relief in the instant case, in Swift & Company, et al. v. United States, 276 U. S. 311, 48 S. Ct. 311, 72 L. Ed. 587, Mr. Justice Brandeis, speaking for the court, said:

> "The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated."

## APPENDIX B

### Opinion of the Circuit Court

This appeal involves the application of the Pennsylvania Fair Trade Act.[1] Plaintiff a manufacturer of electric shavers, complained of violation of the act by defendant, an individual retailer doing a mail-order business from headquarters in Palmyra, Pa. Plaintiff claimed and defendant does not deny, that defendant advertised and sold some of plaintiff's razors at a price lower than the so-called fair trade price. The district court granted relief in very broad terms.[2]

Defendant conducts a mail-order business. He advertises merchandise in publications of National circulation[3] and invites orders for the articles advertised. These articles he ships by mail or express to the buyers. What portion of defendant's sales results in shipments to Pennsylvania buyers and what portion results in shipments to out-of-State buyers is not disclosed.

Defendant has signed no contract agreeing to maintain a minimum price on plaintiff's razors. But plaintiff claims that it is entitled to relief under the nonsigner provision of the statute which states:

"Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in

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[1] Act of June 5, 1935, P. L. 266, as amended June 12, 1941, P. L. 128, 73 PS §§7 and 8.

[2] Defendant was "permanently enjoined and restrained from committing further acts of unfair competition in relation to Fair Trade Act marked products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade agreements . . .". In the course of its opinion the district court states: "The trade-mark must be kept inviolate whether the sale is intrastate or interstate": Sunbeam Corp. v. Wentling, 91 F. Supp. 81 (M. D. Pa., 1950).

[3] The advertisements of which plaintiff complains appeared in two Nationally circulated magazines. The American Rifleman and Field and Stream, and in the November 28, 1948, issue of the Boston Sunday Advertiser.

any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity": 73 PS §8.

The case involves several points which we shall consider one at a time.

1. The constitutionality of fair trade legislation under the United States Constitution and that of the Commonwealth of Pennsylvania with regard to due process and equal protection provisions.

This need not detain us long. Similar legislation was pronounced not violative of the Federal Constitution in Old Dearborn Company v. Seagram Corporation, 299 U. S. 183 (1936). Defendant suggests that the depression conditions which prompted that result in 1936 no longer obtain and if the case now came to the Supreme Court it would be decided the other way. Perhaps so; perhaps not. We think, however, the Supreme Court decision settled the constitutionality of the fair trade acts so far as due process and equal protection under the fourteenth amendment are concerned. We should and do follow it so long as it stands as a declaration of law by the Supreme Court.

Nor do we need to take long in holding the Pennsylvania statute free from attack on the due process or equal protection clauses of the Pennsylvania Constitution. It is true that the Pennsylvania Supreme Court has not passed, in so many words, on the constitutionality of the act under the Pennsylvania Constitution. But it has applied it, apparently without question of its constitutionality.[4] A common pleas court of Philadelphia has definitely declared it to be constitutional.[5] And the overwhelm-

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[4] Lentheric, Inc., v. F. W. Woolworth Co., 338 Pa. 523, 13 A. (2d) 12 (1940).

[5] Welch Grape Juice Co. v. Frankford Grocery Co., 36 Pa. D. & C. 653 (1939).

ing weight of decision in other State courts is to the same effect.[6] Whatever may be the wisdom of this legislation, we think it well established that legislatures, in enacting it, are not violating the provisions of the United States Constitution as to due process, or equal protection, or the State constitutional equivalents thereof.

2. The Miller-Tydings Act. This statute[7] was much discussed by both parties at the argument. We think the statute was intended to relieve persons entering into contracts of the type provided for in these fair trade acts from liability under United States antitrust laws.[8] The legislation was necessary, if such immunity was to be had, because price maintenance agreements had previously been held to be a violation: Dr. Miles Medical Company v. John D. Park & Sons Company, 220 U. S. 373 (1911) (Sherman Act); FTC v. Beech-Nut Packing Co., 257 U. S. 441 (1922) (Federal Trade Commission Act). But the Miller-Tydings Act in no way, we think, affects any question of defendant's liability to plaintiff.

In this regard the case of Whitfield v. State of Ohio, 297 U. S. 431 (1936), presents an interesting parallel. In the Hawes-Cooper Act, 49 U. S. C. §60, Congress authorized the States to regulate the sale of prison-made goods even though manufactured in another State and sold within the State in the original package. Ohio had forbidden the sale of such goods in open market and defendant was convicted

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[6] Since the Seagram case the acts have been held unconstitutional in only one State: Liquor Stores, Inc., v. Continental Distilling Corp., 40 So. (2d) 371 (Fla., 1949). For a list of cases in which the various acts have been passed upon see 2 CCH-Trade Reg. Service §7128.

[7] 26 Stat. at L. 209 (1937), 15 U. S. C. §1.

[8] In Schwegmann Brothers v. Calvert Distillers Corp., 184 F. (2d) 11, 15 (5th Cir., 1950), the court states that the Miller-Tydings amendment "neither authorizes nor prohibits State legislation. . . . It is concerned with, and only with, the Sherman Act, legislation by Congress affecting interstate commerce".

of violation of the statute. The information involved contained two counts, one based on a sale within Ohio, the other on a sale to an Ohio buyer from an Alabama seller. The court stated [9] that "A serious question as to the infringement of the commerce clause of the Constitution is presented by the second count . . .", but found it unnecessary to pass on this, since the conviction was sustained by the first count which was valid because of the Hawes-Cooper Act. Thus, even though Congress had expressly left the field to State regulation, the court intimated Congress either had not or could not authorize the States directly to regulate an interstate sale. The case is not controlling here, but is an indication that we should be wary of interpreting the Miller-Tydings Act as anything more of an authorization to the States than the words require.

3. Application of the statute to interstate transactions.

Some, at least, of defendant's business is interstate commerce. That point seems to us abundantly clear, but since the parties seemed to have some dispute about it we will stop on it for a moment. First, the purchase of advertising space in a publication published in another State and of National circulation is interstate commerce.[10] Likewise, when defendant receives an order from outside Pennsylvania for an article which he fills by mailing it or sending it by express from Palmyra to a point in another State, a

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[9] Whitfield v. State of Ohio, supra, at 437.

[10] To the extent that Blumenstock Bros. v. Curtis Publishing Co., 252 U. S. 436 (1920), can be construed as holding to the contrary we think it is no longer authoritative in the light of more recent cases: United States v. Southeastern Underwriters Assn., 322 U. S. 533 (1944); North American Co. v. SEC, 327 U. S. 686 (1946). Cf. Indiana Farmers Guide Co. v. Prairie Co., 293 U. S. 268 (1934); Charles A. Ramsey Co. v. Associated Bill Posters of United States and Canada, 260 U. S. 501 (1923); Post Printing & Pub. Co. v. Brewster, 246 Fed. 321 (D. C. Kan., 1917); State v. Salt Lake Tribune Pub. Co., 68 Utah 187, 249 Pac. 474 (1926).

transaction in interstate commerce has taken place. It is immaterial, so far as this point is concerned, whether "title" passes at the place of shipping or at destination.[11] The shipment would be equally an interstate matter if no passing of title were involved in the transaction. For instance, if A, in Pennsylvania, sends a Sunbeam Shavemaster to his friend in New York as a loan, no passing of "title" is involved. But the shipment is certainly interstate commerce.

To state that defendant's business is interstate commerce does not answer the question of the applicability of a Fair Trade Act to such commerce. It is well settled that, in the absence of an occupation of the field by Congress, a State may regulate some aspects of interstate commerce.[12] But it is just as well settled that even in the absence of congressional action, the commerce clause is a limitation on the power of States to regulate interstate commerce. A State may not regulate the rates [13] or length [14] of trains even on the intrastate portion of an interstate journey; it may not prohibit the importation into the State of liquor from another State,[15] nor prohibit its sale by one who purchased it from a seller in another State and while still in the

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[11] Uniform Sales Act, §19, rule 5, Act of May 19, 1915, P. L. 543, sec. 19, 69 PS §143. Since defendant pays the cost of transportation, including insurance against loss, the presumption is that the "sale" takes place outside Pennsylvania as to out-of-State customers.

[12] Cooley v. Board of Wardens, 12 How. 299 (U. S. 1852); California v. Thompson, 313 U. S. 109, 113 (1941); California v. Zook, 336 U. S. 725 (1949).

[13] Wabash, St. Louis and Pacific Ry. v. Illinois, 118 U. S. 557 (1886).

[14] Southern Pacific Co. v. Arizona, 325 U. S. 761 (1945).

[15] Bowman v. Chicago & N. W. Ry., 125 U. S. 465 (1888). The Webb-Kenyon Act, 37 Stat. at L. 699 (1913), 27 U. S. C. §122, now prohibits the interstate transportation of intoxicants into any State for use thereof in violation of its laws. It was upheld in Clark Distilling Company v. Western Maryland Railroad Co., 242 U. S. 311 (1917). See McGovney, The Webb-Kenyon Act and Beyond, 3 Iowa L. Bulletin 145 (1917).

original package; [16] it cannot restrict the export or import of goods for the protection of local economic interests.[17] As Professor Rottschaefer puts it: "One aim of the commerce clause was the protection of interstate trade against State interference. As a limit on State powers, it is a free trade charter for National commerce." [18]

As in so many constitutional questions, the line between permissible and prohibited State regulation is not a clear one. Chief Justice Stone, in Southern Pacific Co. v. Arizona, 325 U. S. 761, 770 (1945), voiced what is apparently the presently accepted approach.[19] He said that "there has been left to the States wide scope for the regulation of matters of local State concern, even thougt it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across State lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant National concern. . . . The matters for ultimate determination are . . . whether the relative weights of the State and National interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its

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[16] Leisy v. Hardin, 135 U. S. 100 (1890). As to intoxicating liquor the rules were changed by the Wilson Act, 26 Stat. at L. 313 (1890), 27 U. S. C. §121, which authorized the States to prohibit the resale of liquor. This act was said to deprive intoxicating liquor of its interstate character.

[17] Hood & Sons v. DuMond, 336 U. S. 525 (1949); Baldwir v. Seelig, 294 U. S. 511 (1935); Pennsylvania v. West Virginia, 262 U. S. 553 (1923).

[18] Rottschaefer, The Constitution and Socio-Economic Change, 102 (1948). The same idea was forcibly stated by Mr. Justice Jackson thus: "The material success that has come to the inhabitants of the States which make up this Federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the States only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions": Hood & Sons v. DuMond, 336 U. S. 525, 538 (1949).

[19] For an excellent and up-to-date discussion of this problem see Dowling, Constitutional Law, Significant Developments in the Law During the War Years, 9 (Practising Law Institute Series, 1948).

freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from State interference".

It is not difficult to put a case in which nonuniform State laws in this price regulation field will result in a complete block to trade between States in "fair traded" commodities. Here is one. There is no requirement that the established fair trade price be uniform throughout the States.[20] Thus we have the posiblity of a situation where, for instance, the fair trade price of an article has been fixed in Pennsylvania at $1 and in South Carolina at 75 cents. If the Pennsylvania statute is permitted to govern interstate sales, no sales in that commodity can be made by Pennsylvania sellers to South Carolina buyers. If the Pennsylvania seller were to meet the competition of South Carolina sellers, he would commit a tort in Pennsylvania, and yet he would be selling at the very price set in South Carolina as "fair trade". Further, if a State may regulate the price at which an article must be sold if it is to be shipped out of the State, may it not equally well regulate the price for which the article must have been sold before it is allowed to come into the State? Tariff barriers are but feeble obstacles compared with such a blockade on the interstate movement of goods.

The possibility of such a barrier to interstate commerce from nonuniform State regulation illustrates the substantial effect such regulation will have on interstate commerce if applied to interstate sales. Such sales are a fit subject for uniform regulation should Congress desire it, and we see no peculiar local interest which justifies the imposition upon interstate commerce of such restriction by individual

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[20] The acts of 30 States authorize a minimum price, whereas the others provide for an absolute price; in 24 States a person other than the owner of the trade-mark may establish the price, in 21 any other person may not; in 29 States obliteration of the trade-mark exempts the commodity from the act, in 13 it does not. For a compilation of these and other variations see 2 CCH-Trade Reg. Service §§7011-13.

States. The local cut-price sale with a loss leader feature, which seems to have constituted a much stressed argument for the legislation, is adequately cared for in giving the statute a local application only.

These grave constitutional difficulties involved in any broader interpretation lead us to the conclusion that the Pennsylvania Fair Trade Act is to be construed as not to apply to sales by Pennsylvania retailers to consumers in other States, or to advertisements in publications published in other States. The California court dealing with a statute similar to that of Pennsylvania was so sure of this point that it hardly gave the question discussion and construed the California Fair Trade Act "as applying only to transactions within the State, that being the sole territorial extent of the legislature's powers": Max Factor & Co. v. Kunsman, 5 Cal. (2d) 446, 55 P.(2d) 177 (1936). New Jersey has evidently thought the same about its statute.[21] We think a similar construction should be given to the Pennsylvania statute. We are reinforced in this conclusion by the well-established line of authority which interprets a statute to conform to constitutional limitations whenever it is possible to do so.[22]

In view of the position we take on this matter, a modification of the district court decree will be necessary. The decree will be vacated and the case remanded to the district court with directions to enter a decree limiting the injunction against defendant to intrastate transactions in Pennsylvania, and for further proceedings not inconsistent with this opinion.

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[21] Johnson & Johnson v. Weissbard, 121 N. J. Eq. 585, 586, 191 Atl. 873 (1937). For a general discussion of the problem and a conclusion similar to that reached here, see 2 CCH-Trade Reg. Service §7308.

[22] See Kovacs v. Cooper, 336 U. S. 77, 85 (1949); Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 470 (1945); Arizona Employers' Liability Cases, 250 U. S. 400, 430 (1919); United States v. Weisenbloom, 168 F. (2d) 698, 700 (2d Cir., 1949).

## APPENDIX C

Section 1 of the Sherman Act (July 2, 1890, C. 647, sec. 1, 26 Stat. 209) with the Miller-Tydings Amendment thereto being the two "proviso" clauses (August 17, 1937, C. 690. Title VIII, 50 Stat. 693 [15 U. S. C. A. 1]):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

## APPENDIX D

The pertinent provisions of the Pennsylvania Fair Trade Act of 1935, June 5, P. L. 266, as amended June 12, 1941, P. L. 128 (73 P.S. 7 and 8):

"No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to the consumer bears the trade-mark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.

"(b) That the buyer of such commodity require upon his resale of such commodity that the purchaser from him agree that such purchaser will not in turn resell except at the price stipulated by the vendor of the buyer.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

"(a) In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

"(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof.

"(c) By any officer acting under orders of any court or in the execution of any writ or distress.

"Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated

in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor buyer or purchaser of such commodity."

## APPENDIX E

The following excerpt is quoted from Alfred Lief's book, "The Brandeis Guide to the Modern World":

"If a dealer is selling unknown goods or goods under his own name, he alone should set the price; but when a dealer has to use somebody else's name or brand in order to sell goods, then the owner of that name or brand has an interest which should be respected. The transaction is essentially one between the two principals—the maker and the user. All others are middlemen or agents; for the product is not really sold until it has been bought by the consumer.

"Why should one middleman have the power to depreciate in the public mind the value of the maker's brand and render it unprofitable not only for the maker but for other middlemen? Why should one middleman be allowed to indulge in a practice of price-cutting, which tends to drive the maker's goods out of the market and in the end interferes with people getting the goods at all?

"When a trademarked article is advertised to be sold at less than the standard price, it is generally done to attract persons to a particular store by the offer of an obviously extraordinary bargain. It is a bait—called by the dealers a 'leader'. But the cut-price article would more appropriately be termed a 'mis-leader'; because ordinarily the very purpose of the cut-price is to create a false impression.

"The evil results of price-cutting are far reaching. It is sometimes urged that price-cutting of a trademarked article injures no one; that the producer is not injured, since he received his full price in the original sale to jobber or

retailer; and indeed may be benefited by increased sale, since lower prices ordinarily stimulate trade; that the retailer cannot be harmed, since he has cut the price voluntarily to advance his own interests; that the consumer is surely benefited because he gets the article cheaper. But this reasoning is most superficial and misleading.

"To sell a dollar watch for 67 cents injures both the manufacturer and the regular dealer; because it tends to make the public believe that either the manufacturer's or the dealer's profits are ordinarily exorbitant; or, in other words, that the watch is not worth a dollar.

"Such a cut necessarily impairs the reputation of the article, and by impairing reputation, lessens the demand. It may even destroy the manufacturer's market.

"A few conspicuous 'cut-price sales' in any market will demoralize the trade of the regular dealers in that article. They cannot sell it at cut prices without losing money. They might be able to sell a few of the articles at the established price, but they would do so at the risk of their own reputation.

"The cut by others, if known, would create the impression on their own customers of having been overcharged. It is better policy for the regular dealer to drop the line altogether.

"On the other hand, the demand for the article from the irregular dealer who cuts the price is short-lived. The cut-price article cannot long remain his 'leader'. His use for it is sporadic and temporary. One 'leader' is soon discarded for another. Then the cut-price outlet is closed to the producer, and meanwhile the regular trade has been lost.

"Thus a single prominent price-cutter can ruin a market for both the producer and the regular retailer is serious.

"On the other hand, the consumer's gain from price-cutting is only sporadic and temporary. The few who buy a standard article for less than its value do benefit—unless they have, at the same time, been misled into buying some other article at more than its value. But the public generally is the loser; and the losses are often permanent."

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

---

## No. 538

---

SUNBEAM CORPORATION, a Corporation,

*Petitioner,*

VS.

S. A. WENTLING,

*Respondent.*

---

**BRIEF OF STATE OF ILLINOIS SPONSORED BY IVAN A. ELLIOTT, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, IN SUPPORT OF THE PETITION OF SUNBEAM CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.**

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---

**Application for Leave to File Brief as Amicus Curiae.**

Ivan A. Elliott, Attorney General of the State of Illinois, respectfully applies for leave to file his brief as *amicus curiae* herein on behalf of the State of Illinois.

Illinois here is concerned as to an area of interstate commerce, regulation of which has been abdicated by the Federal Government. Illinois, in interest of its own sovereignty, acting through its Attorney General, feels it necessary to project its own ideas and arguments against the holding of the Circuit Court below.

**Reference to Opinions Below.**

The opinion of the Court of Appeals below is published in 185 Fed. 2d 903. The opinion of the District Court is set forth in full as Appendix A in Petitioner's brief.

**Basis On Which It Is Contended That This Court Has Jurisdiction.**

This Court's jurisdiction is invoked under Section 1257, 28 U. S. C. A.

Leave to file this brief as *amicus curiae* is sought pursuant to Rule 27, sub-paragraphs 9(b) and (c), of the Rules of this Court.

The reason prompting this application for leave to file the instant brief is that the decision of the Court of Appeals below frustrates the right and power of the State of Illinois to lend enforcement to effective Fair Trade contracts made and entered into as permitted by the Miller-Tydings amendment to the Sherman Act (15 U. S. C. A. 1) and the Illinois Fair Trade Act (Ill. Rev. Stats. 1949, Ch. 121½, Pars. 181, 189).

**Statement of the Case.**

All of the facts material to the consideration of the questions presented, with page references, appear at pages 10 to 12 of Petitioner's brief.

As to the interest of the applicant here, the State of Illinois enacted a Fair Trade Act in 1935, the text of which is set forth as Appendix I (Laws 1935, p. 1436; Ill. Rev. Stats. 1949, Ch. 121½, Pars. 188, 189). The validity of this statute was upheld by this Court in *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183.

The Illinois Fair Trade Act is almost identical to the Pennsylvania Fair Trade Act involved here (Act of June 5, 1935, PL 266; June 12, 1941, PL 128; 73 PS 7, 8).

The Court of Appeals below has held that contracts entered into as authorized by the Pennsylvania Fair Trade Act may not be enforced if they are to be effective beyond Pennsylvania's boundaries. Such a holding, for all practical purposes, nullifies the effectiveness of that Act, in that it charts out a course of dealing which Fair Trade contracts made and entered into under Pennsylvania law can have no effect to control.

If that ruling correctly states the law, then there may be no effective control of prices under the Illinois Fair Trade Act, because the course of dealing there sanctioned would permit a vendor of trade-marked commodities operating outside its boundaries to flood the Illinois market with such trade-marked commodities at prices less than those required of retailers selling such commodities within Illinois boundaries.

## ARGUMENT.

The Sherman Act, enacted in 1896 provided:

> "Every contract * * * in restraint of trade or commerce among the several states * * * is illegal." (15 U. S. C. A. 1.)

This was a declaration of policy by Congress outlawing such contracts which regulated interstate commerce. Congress was authorized to legislate in this field, and declare the policy of the nation, by reason of the commerce clause of the Federal Constitution (Art. I, Sec. 8).

The Miller-Tydings amendment of 1937 added the following proviso:

> "* * * nothing * * * (herein) shall render illegal contracts or agreements prescribing minimum prices for the resale of a (trade marked) commodity * * * when (such) contracts * * * are lawful as applied to intrastate transactions, under any (local) statute (effective where) such resale is to be made, * * * or * * * (where) the commodity is to be transported for such resale * * *" (15 U. S. C. A. 1).

This amendment altered the declared policy expressed by Congress in the Sherman Act, so as to condone, or even approve, vertical contracts which restricted resale of trademarked commodities upon a minimum price. It expressed that policy of approval of such contracts, whether their effect was local or purely intrastate, or whether their effect extended beyond local boundaries and was interstate. It said, so long as the applicable local statute permitted or approved, such contracts which affect interstate commerce should be legal, effective and enforceable.

The Circuit Court below has termed the Pennsylvania Fair Trade Act itself as being regulatory of interstate

commerce. It has misconceived the actual situation. It is not the Fair Trade Act which regulates interstate commerce; it is the *contracts* which do so; and Congress has declared its policy as not rendering nugatory such contracts when they attempt so to do.

Forty-four states have enacted fair trade statutes. (2 CCH Trade Reg. Serv. 7079, § 7094). That of Illinois (Ill. Rev. Stats., 1949, Ch. 121½, Pars. 188, 189; Laws 1935, p. 1436) declares (Section 1):

> "No contract relating to the sale or resale of a (trade marked) commodity * * * shall be deemed in violation of * * * law * * * by reason of * * * the following provisions * * *:
>
> (1) That the buyer will not resell except at the price stipulated * * *;
>
> (2) That the producer or vendee * * * require upon the sale * * * to another * * * that he will not, in turn, resell except at the price stipulated by such producer or vendee * * *."

Section 2 of the statute provides:

> "Willfully and knowingly, advertising, offering for sale, or selling any commodity at less than the price stipulated * * * whether or not the person so (doing) is * * * a party to such contract, is unfair competition and * * * actionable * * *".

The first section is a declaration of policy by the State that such contracts, regulating either local or interstate commerce, are not counter to the policy of the State enacting such law.

The crucial question is whether Section 2 of the Fair Trade Acts, all of which are substantially similar, are themselves a regulation of commerce, either intrastate or interstate, or whether their provisions simply provide a means of enforcing the contracts which are authorized by the expressed policy both of the Federal Government and

of the States. We are sure that the latter is the answer, and not the former.

The Fair Trade Acts envision a course of vertical price fixing of trade-marked articles. Sub-paragraph 1 of Section 1 contemplates a merchandising chain with but one link between the producer and the consumer, namely, the retailer. It approves contracts between the producer and the retailer which would compel the retailer to resell at a minimum price. In such cases the retailer is a party to the contract, and clearly his breach of the contract is actionable.

The great bulk of merchandising systems, however, are not so simple. In many cases the producer sells to a wholesaler, the wholesaler to a distributor, the distributor to a jobber, and the jobber to the retailer. Some may have more links. and some may have less; but rarely does the producer sell direct to the retailer.

Sub-paragraph 2 of Section 1 envisions this type of a merchandising chain. In it, the only one with whom the producer has a *direct* contractual relation is the wholesaler. That sub-paragraph provides that when the producer sells to the wholesaler, he not only may exact a minimum resale price from the wholesaler, but also compel the wholesaler, in turn, to require a minimum resale price from his vendee, and so on down the succeeding links of the merchandising chain. Now it is obvious that under such a system of vertical merchandising there are bound to arise instances where some one of the links in that chain would acquire the trade-marked goods without being a party to any fair trade contract,—this by reason of one of the vendees of the trade-marked commodity refusing or neglecting, in turn, to exact a promise from *his* vendee.

When Section 2 makes actionable advertising, offering for sale, or selling any commodity at less than the fair trade

price, whether the person so doing is a party to the contract, or not, it contemplates a sale by such a vendee, who has knowledge of the previous contracts. That is the reason for making *wilful* and *knowing* resales actionable, and not resales made without knowledge of such contract provisions. This section simply provides for enforcement of the contracts. At most it enlarges a remedy otherwise existent.

This does no violence to concepts of the law of contracts. It is analogous to enforcement of covenants running with the land; or to damages for wilfully causing breach of a contract by one not a party thereto (*Port Chester Wine & L. Shop.* v. *Miller Bros.*, 281 N. Y. 101; 22 N. E. 2d 253, 254).

The viewpoint expressed here finds support in *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 193, 194, where it is said:

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned. * * * Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it."

Section 2 viewed in this light, does not itself prescribe a regulation of commerce. Such a construction would make it illegal even on an intrastate basis. *Doubleday, Doran & Co.* v. *Macy & Co.*, 269 N. Y. 272; 199 N. E. 409, 411; 103 A. L. R. 1325. Moreover, if the statute itself were regula-

tory, and itself fixed and regulated prices, it would be an unlawful delegation of legislative authority, since the terms of such price fixing would not be fixed by the legislature, but rather by reference to any number of contracts which had no existence at the time of such legislation. Such a construction was thrust aside in *McNeil* v. *Triner Corp.*, 363 Ill. 559, 581, 582.

The true and proper construction of Fair Trade Acts, as we have shown above, is simply that they declare State policy in approval of such contracts, and provide a means of enforcing them.

This construction is exactly and literally within the permissive area of the regulation of commerce by such contracts afforded by the Miller-Tydings amendment to the Sherman Act; and its correctness is emphasized by reason of the apparent similarity and draftsmanship between the State statutes and the enabling Federal Amendment.

So when the local statutes are viewed in their proper perspective, we see that they simply authorize and provide means of enforcing restrictive contracts, in a narrow area, which the Miller-Tydings amendment condones and approves, insofar as those contracts regulate interstate commerce within that area.

Certainly courts, State or Federal (where diversity exists) may enforce those contracts.

## Conclusion.

For the foregoing reasons the Attorney General of Illinois respectfully urges that a writ of certiorari should issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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## APPENDIX I.

THE ILLINOIS FAIR TRADE ACT (ILL. REV. STAT. 1949, CH. 121½, PARS. 188, 189).

§ 188. **Contract relating to sale not invalid because of certain provisions.** No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice if given to the public thereof.

(3) By any officer acting under the orders of any court.

§ 189. **Advertising for sale at less than stipulated price.** Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

October Term, 1950 — No. 538

SUNBEAM CORPORATION, a Corporation,
*Petitioner*

vs.

S. A. WENTLING,
*Respondent*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

*To the Honorable the Chief Justice and the Associated Justices of the Supreme Court of the United States:*

S. A. Wentling urges that the petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Third Circuit vacating a decree of the District Court of the United States for the Middle District of Pennsylvania be denied.

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## I.

## COUNTER-STATEMENT OF THE MATTER INVOLVED

---

Respondent is an individual who for a number of years has made his living by retail sales, to consumers located in all of the states and in foreign countries, of a number of lines of products, which, up to the time this suit was instituted, included petitioner's merchandise. As a part of this business he placed advertisements, in a number of sports magazines which circulate throughout the entire country, in all of the states, and in foreign countries. Respondent conducted this business through the mails from an upstairs bedroom in

his home in the Borough of Palmyra, Lebanon County, Pennsylvania.

Customers from all over the country and foreign countries would send orders to him by mail. He sent the goods to them by mail, paying the cost of transportation and of insurance, and guaranteeing to each customer that if upon arrival, and inspection, the customer was not satisfied for any reason or no reason, the goods could be returned.

On May 5, 1949, the Sunbeam Corporation, after several threats to Respondent, commenced the instant suit in the United States District Court, Middle District of Pennsylvania, by filing there a Complaint in Equity, based upon the so-called "Fair Trade Act" of Pennsylvania, which in substance legalizes a contract or contracts between a manufacturer and one or more retailers in Pennsylvania fixing the minimum price at which the retailer may sell the manufacturer's product. The "non-signer" section of this Act then fastens the price thus fixed by the contract or contracts on all other retailers in the state who have knowledge of such contract.

The pertinent portions of this Act of 1935, June 5, P.L. 266, as amended June 12, 1941, P.L. 128 (73 PS 7 and 8) are set forth in Appendix D to Petitioner's Brief.

The above Pennsylvania "Fair Trade Act" should be read in connection with Section 1 of the Sherman Act, as amended by the addition of two proviso clauses known as the "Miller-Tydings Amendment" (July 2, 1890, C. 647, § 1, 26 Stat. 209; Aug. 17, 1937, C. 690,

Title VIII, 50 Stat. 693, 15 U.S.C.A. 1). This Section is set forth as Appendix C to Petitioner's Brief.

Petitioner-manufacturer attached to its Complaint contracts with four retailers in Pennsylvania whereby they agreed to sell Petitioner's model "S" Shavemaster at not less than $23.50. Petitioner complained that Respondent had advertised a lower price in a number of sports magazines circulating in all the states and in foreign countries.

Since Respondent had never entered into any such price-fixing contract with Petitioner, Petitioner claimed that Respondent had violated the "non-signer" section of the Pennsylvania Act quoted above, because Respondent had knowledge of the prices fixed in the contracts with the four retailers.

Petitioner prayed for a sweeping injunction under the Pennsylvania Act above against all advertising by Respondent of his lower price, and against all sales by Respondent at a lower price, without regard to whether the sales were made in Pennsylvania or any other state or foreign country; and whether the advertisement circulated entirely or predominantly within the other states or foreign countries.

In his answer, as amended, Respondent resisted an injunction, inter alia, on the grounds that neither Plaintiff's contract nor the Pennsylvania statute applied to his advertisements and sales transacted in other states and in foreign countries.

Petitioner moved for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure.

Argument was heard by District Judge Frederick V. Follmer in Harrisburg, Pennsylvania, on October 14, 1949.

Judge Follmer handed down his order granting the sweeping injunction prayed for by Petitioner, and from that order, Respondent appealed to the United States Court of Appeals for the Third Circuit.

The Court of Appeals entered an order vacating the decree of the District Court **insofar as it pertained to interstate sales,** and later refused Petitioner's request for reargument.

## II.

## RESPONDENT'S VIEWS CONCERNING QUESTIONS PRESENTED BY PETITIONER

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1. There is no conflict between the holding in this case and the ruling of the Fifth Circuit in **Schwegmann Bros. v. Calvert,** 184 F. (2d) 11. In that case the defendants, Schwegmann Brothers, contended:

(1) That the so-called price-maintenance contracts on which enforcement of the Fair Trade Law against the non-signing defendants is based, are null and void under the laws of Louisiana for want of mutuality or because of potestativity; and (2) that the scope of the resale price-maintenance permitted by the Miller-Tydings Amendment does not extend to non-contracting retailers. The facts in the case were that all of defendants' resales were wholly intrastate, and defendants, not having signed a fair trade agreement, challenged the validity of the non-signer provisions of the Louisiana Fair Trade Act. The ruling in that case is wholly consistent with that of the Third Circuit which held that the Respondent, although a non-signer, is bound by Petitioner's Fair Trade contracts so far as intrastate re-sales are concerned, but that the Pennsylvania Statute is not permitted to govern Respondent's subsequent interstate sales.

2. The Circuit Court has **not** failed to give effect to the Miller-Tydings Amendment. The purpose of

Miller-Tydings was to remove contracts between manufacturers in one state and retailers in another state from the realm of the Sherman Act when goods moved interstate from the manufacturer to the retailer for intrastate resale. Certainly the Circuit Court's opinion does not interfere with the operation of the Amendment in this respect.

3. The District Court was **not** right in its ruling, as stated in the question, for the applicable reasons stated in the Circuit Court's opinion wherein it construed the Pennsylvania Act as not applying to sales by Pennsylvania retailers to consumers in other states.

4. The Circuit Court did **not** err in construing the Pennsylvania Fair Trade Act as not applying to sales by Pennsylvania retailers to consumers in other states for the reasons set forth in Judge Goodrich's opinion. Petitioner uses of the word "price-cutting", connoting an unethical business practice, but its question could just as well have been worded: "if construed to permit enjoining interstate sales at reasonable prices rather than at artifically pegged prices by individuals operating from headquarters in Pennsylvania."

5. No. Petitioner indulges in a contradiction by saying that the Sherman Act and the Miller-Tydings amendment were regulatory of commerce, but that the state statutes, declaring fair trade contracts to be legal, are not regulatory. If one is regulation, so is the other. Both the Acts of Congress and the state statute permit the doing, within a limited sphere, of that which was formerly condemned by statute.

6. The Circuit Court did not construe Miller-Tydings as having "purely intrastate effect", and did not interfere in any way with its applicability to contracts between manufacturers in one state and retailers in another, as stated in our comment to question 2 above.

7 and 8. The Circuit Court did not repeal a "legislated merchandising policy"; on the contrary it merely restricted to applicability of the Pennsylvania Fair Trade Act to the purpose for which it was passed. Petitioner loses sight of the purpose behind this legislation, fuller reference to which is made in our argument which follows.

## III.

## RESPONDENT'S COMMENTS ON PETITIONER'S REASONS FOR GRANTING THE WRIT

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1. It is denied that the decison below is in direct conflict with **Schwegmann Bros. v. Calvert Distillers,** 184 F. (2d) 11 (1950), for the reasons stated in our comment to question 1 above.

2. The decision below will have no effect whatsoever on, and certainly will not nullify, the fair trade Act of any state or the Miller-Tydings Amendment. For years, manufacturers have carried on their businesses satisfactorily under the state acts, and, apparently, other manufacturers knew, or should have known, that the several state statutes have no applicability to interstate resales. In 2CCH Trade Reg. Ser. 7117, the opinion has been expressed for years:

> "Non-contracting dealers not being under a contractual liability, are forced to maintain established prices only if they are subject to state statutory prohibitions. **It seems that interstate sales should not be held subject to the prohibitions of any state law."** (Boldface ours)

3. Petitioner's position is untenable. The Circuit Court held that the proper construction of the Pennsylvania Fair Trade Act was to limit its applicability to intrastate resales. The Court did not declare

the Act unconstitutional, but interpreted the language of the Act in the light of constitutional barriers to the construction contended for by Petitioner. Furthermore, the effectiveness of the Pennsylvania statute has not been denied; it remains effective as in the past to enforce price-fixing contracts with respect to intrastate resales.

4. The Circuit Court did not "frustrate" an Act of Congress. Again, Petitioner has failed to recognize the congressional intent behind the Miller-Tydings Amendment, as has been set forth above. The frustration of Petitioner's desire to torture the Amendment to mean that which was never intended cannot be the basis for an application to this Court.

## IV.

## ARGUMENT

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### A.

**(Respondent herein sets forth a portion of his argument presented to the United States Court for Appeals for the Third Circuit.)**

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### Neither Petitioner's Contract nor the Pennsylvania Statute Apply to Respondent's Transactions in Interstate and Foreign Commerce.

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### 1. Petitioner's contract is confined to Pennsylvania sales.

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Outside of the Boston Sunday Advertiser, circulating chiefly around Boston, Massachusetts, Respondent's advertisements, including those Petitioner complains of, have been carried exclusively in sports magazines which circulate throughout all the states, in the possessions, and in foreign countries. Not one of these periodicals is printed or published in Pennsylvania. The circulation of his advertisements as part of these periodicals is thus in interstate and foreign commerce. **Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.**, 293 U.S. 268, 55 S. Ct. 182, 184; **International**

**Text Book Co. v. Pigg,** 217 U.S. 91, 30 S. Ct. 481; **Pensacola Tel. Co. v. West, Etc., Tel. Co.,** 96 U.S. 1, 9, 10. And so are the communications relating to sales passing between him and customers in other states and foreign countries. **International Text Book Co. v. Pigg** (supra); **Butler Bros. Shoe Co. v. United States Rubber Co.,** 84 C.C.A. 167, 183, 156 Fed. 1, 17; **Rottschaeffer on Constitutional Law,** 231, 235.

The actual shipment of goods from Pennsylvania into other states contemplated by the respondent and the customers in other states in all of the above interstate communications is, of course, under the earliest definitions of that term interstate commerce. 11 Am. Jr. § 4, **Rottschaeffer** (supra) 231. And since the parties from the outstart of negotiations contemplate the shipment across state or national boundaries, the entire transaction becomes one in interstate or foreign commerce. **Rottschaeffer** (supra) at page 235 states:

> "The decisive factor that renders making a contract an act of interstate commerce is that it contemplates or necessarily involves the movement of goods in interstate commerce and this test applies whether it be a contract to buy or one to sell."
>
> (citing **Dahnke-Walker Milling Co. v. Bandurant,** 257 U.S. 28, 42 S. Ct. 106 **Crenshaw v. State of Arkansas,** 227 U.S.389, 33 S. Ct. 294.)

The form contract exhibited in petitioner's complaint is entitled "Retail Sales Contract Covering Products of Sunbeam Corporation (Address) **Under**

**Pennsylvania Fair Trade Act."** The first paragraph recites: "Whereas, Producer is **engaged in the sale and distribution in Pennsylvania** of various commodities (etc.)." The third paragraph states: "Whereas, the Producer is the manufacturer and owner of said commodities covered by the terms of this agreement and **offered for sale within the State of Pennsylvania; and Retailer is engaged in the retail sale and distribution of said commodities within the said State**; and" Paragraph four: "Whereas the Producer and Retailer mutually **desire to avail themselves of the provisions and protection of the Pennsylvania Fair Trade Act;"** (Boldface supplied). Paragraph six: "* * * Provided retailer shall before offering any of such commodities for sale, at prices less than the stipulated retail price, first offer to sell such commodities to Producer at the current wholesale price then prevailing for such commodities in the State of Pennsylvania."

The fair intention to be derived from the language of the contract is that:

1. It is between parties distributing and retailing **within the State of Pennsylvania,** and

2. It invokes the protection of the Pennsylvania Fair Trade Act, and

3. It does not invoke the protection, or is it based upon the law of any other state, and

4. It contemplates sales within the state of Pennsylvania, i. e., intrastate transactions, and

5. It does not purport to apply to retail sales or any other transactions in other states or in foreign countries.

With respect to the retailers who entered into these contracts, and signed them, there is no mention of sales made by such retailers outside of Pennsylvania, nor are such sales mentioned or contemplated in these contracts. Nor is there anything in the Pennsylvania statute or in the Miller-Tydings Amendment which would supply these terms in petitioner's contracts. **Neither of these enactments, read in the most liberal spirit, makes a contract for the parties. They only save from the invalidity which would otherwise result from their price-fixing features, the contracts the parties themselves have made.** Whatever may be the permitted power to make contracts covering retail sale transactions outside of Pennsylvania, as well as within Pennsylvania, such contracts were not made in this case. Nor was it necessary. The retailers concerned conduct local stores and sell to their communities in purely intrastate sales transactions. The protection contemplated, which is in accord with the purpose of the Fair Trade Act, is against other local shopkeepers who by "loss-leader" practices might prey upon this local patronage. Sales into other states by these local retailers is not at all within the normal course of such intrastate business and naturally was not within the contemplation of the parties.

And yet, notwithstanding these contracts were not made to apply to interstate sales by contracting and signing retailers, petitioner contended that they do apply to the interstate selling and advertising transactions of non-signing and non-contracting parties like the respondent. As if it were not enough that non-signing retailer is bound to the contract terms of strang-

ers equally with the parties thereto, petitioner maintains that the non-signer is to be bound beyond that point to terms the strangers did not even agree to.

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## 2. Scope of the Pennsylvania Act before the Miller-Tydings Amendment.

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Of course, respondent, not being a party to the contracts, is bound to observe the prices therein only to the extent provided by the section of the Pennsylvania Fair Trade Act. It is to be emphasized that **petitioner is proceeding and relying on that section of the Pennsylvania Act alone and under the act of no other state or states.** Respondent was sent a Pennsylvania contract form, which does not deal with interstate sales but embraces sales "within Pennsylvania", and is specifically stated therein to be "under the Pennsylvania Fair Trade Act" alone, and this suit has been brought under that act alone. Leaving to one side for the moment the effect of the Miller-Tydings Amendment on the Pennsylvania act and supposing that the absence of coverage in the contract does not eliminate respondent's sales in other states from the coverage of the Pennsylvania statute, the act itself (aside from its purpose as declared above to be to prevent local, intrastate loss-leader selling) cannot be made to prohibit sales into other states below an established price. A state cannot lawfully prohibit the sale either to or from another state of a commodity below an established price. **Bowman v. Chicago & N. W. Railway Co.,** 125 U.S. 465, 8 S. Ct. 689; **Leisy v. Hardin,** 135 U.S.

100, 10 S. Ct. 681; **Cheney Bros. Co. v. Mass.**, 246 U.S. 147, 38 S. Ct. 295; **Alpha Portland Cement Co. v. Mass.**, 268 U.S. 203, 45 S. Ct. 477; **Whitfield v. State of Ohio**, 297 U.S. 431, 56 S. Ct. 532; **Rhodes v. State of Ohio**, 170 U.S. 412, 18 S. Ct. 664.

Likewise, a state cannot lawfully prohibit the circulation of advertisements within its borders in a periodical published outside the state and circulating throughout many states, interfering with the placing of such advertising by one engaged in interstate commerce, where the article advertised is not malum in se, but is regulated by the state. **Post Printing & Pub. Co. v. Brewster**, 246 Fed. 321; **State v. Salt Lake Tribune Pub. Co.**, 68 Utah 187, 249 Pac. 474 (48 A.L.R. 553); **Star-Chronicle Pub. Co. v. United Press Assoc.**, 122 C.C.A. 489, 204 Fed. 217.

The language of the Miller-Tydings Amendment thus describes the base of applicability of the state acts from which it makes the extension we shall define later, as follows:

> (Fair trade contracts are exempted from the Sherman Act) "when contracts or agreements of that description are lawful **as applied to intrastate transactions** under any statute * * * in any State * * *."
>
> (Boldface ours)

The highest court in California, affirmed by the highest court of the United States, stated that while the California Fair Trade Act might conceivably be construed to embrace interstate transactions, it would be construed as applying only to intrastate trans-

actions and to commodities confined to intrastate commerce to uphold its validity in the face of the contention that it attempted to regulate interstate commerce. **Max Factor and Co. v. Kunsman,** 5 Cal. (2d) 446, 467, 55 P. (2d) 177, aff'd 299 U.S. 198, 57 S. Ct. 147 (1936). The California court stated:

> "Although the terms of the statute are broad, and could conceivably be interpreted to include interstate transactions, we must necessarily construe the act as applying only to transactions within the state, that being the sole territorial extent of the legislature's powers."
>
> **(California Adjustment Co. v. Atchison, T. & S. F. Ry. Co.,** 179 Cal. 140, 175 Pac. 682, 13 A.L.R. 274; **American Banana Co. v. United Fruit Co.,** 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047.)

Petitioner saw the impossible nature of a contention that a contract of sale which is transacted in another state should be subject to the law of Pennsylvania, and resorted below to obviously bad law to relieve its plight. It contended that an advertisement is an offer to sell, and that the contract of sale is completed upon writing to the one advertising and accepting it. This proposition, if there were authority for it, would make all of respondent's sales occur within the state of Pennsylvania, and would subject them to the Pennsylvania statute. But it just isn't so. Conceivably, an advertisement **could be** worded so as to constitute an offer, but that is not our case. See

**Restatement of Law of Contracts,** § 25, and illustrations thereunder.

However, petitioner did not rely too heavily upon its position that the contracts of respondent were intrastate transactions and subject to Pennsylvania laws. Petitioner argued:

> "However, the intent of the Miller-Tydings Amendment to the Sherman Act was to make such agreements valid in both interstate and intrastate transactions so long as the state where the sale takes place has a fair trade law." (Plaintiff's Brief sur Motion for Summary Judgment, p. 25).

In support of that contention it cited one case decided in Louisiana: **Pepsodent Co. v. Krauss Co.,** 56 F. Supp. 922. The real issue in that case was, however, stated by the court as follows:

> "And defendant contends that the mere fact that Congress has removed the prohibition against combinations in restraint of trade in so far as the parties to a fair trade contract are concerned is not evidence of the fact that it intended to make resale price maintenance enforceable against retailers such as defendants who would not enter into such contracts.
>
> "Plaintiff on the other hand contends that the legislative history of the Miller-Tydings amendment makes it clear that **Congress intended to leave each state free to deal in its own discretion with the problem of resale price maintenance and not to leave that subject in the same locality governed in a hybrid fashion by local law as to the**

**activities of contracting retailers and by federal law as to the competing activities of non-contracting retailers."**

(Boldface ours)

The court upheld the latter position, and found that the non-signer provision of the state law was intended by Congress to be excepted from illegality under the Sherman Act by the Miller-Tydings Amendment, and was therefore not in conflict with the Sherman Act. In other words, Congress by the amendment, legalized the application under state law of fair trade contracts to non-signers as well as to signers.

But that is not at all the issue here. To say that the application of the state law to "competing activities in the same locality" of non-signers is excepted from illegality under the Sherman Act by the amendment, as well as the application of the state law to the activities of the contracting parties is one thing: it is something else entirely to say that the amendment extends the terms of a fair trade contract beyond the language and contemplation of the parties, and extends the application of the law (with reference to non-signers) of one state beyond the limits of that application as they existed before the amendment. The court's holding that the two were coextensive within pre-established limits, does not mean that either one is extended indefinitely beyond those limits. Yet petitioner contends that the Pennsylvania statute applies to respondent's advertisements circulated in periodicals in all the other 47 states and in foreign countries; that it applies to shipments into other states and countries under contracts transacted in those other

states and countries. If the Pennsylvania statute did not apply to such transactions before the amendment, it can apply to them since that amendment only by an extension effected by the amendment in one or both ways, that is (a) the amendment extended the statute of a state to this degree, or (b) the amendment itself constitutes a substantive enactment (a federal fair trade law) which is itself such an extension of the state law. Actually, neither one was intended by Congress, as the history of the amendment (including that cited in the Pepsodent case) clearly demonstrates.

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### 3. Is the Miller-Tydings Amendment a Federal Fair Trade Act?

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It is clear that prior to passage of the Miller-Tydings Amendment to the Sherman Act, resale price maintenance contracts, such as the ones in Exhibit A of the complaint, were illegal under Section 1 of the Sherman Act, which read:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."
>
> 15 USCA § 1.
>
> **Dr. Miles Medical Company v. John D. Park & Sons Company**, 220 U.S. 373, 31 S. Ct. 376;

**John D. Park and Sons v. Hartman,** 153 Fed. 24, cert. den. 212 U.S. 588;

**Straus v. Victor Talking Machine Co.,** 243 U. S. 490, 37 S. Ct. 412;

**Ford Motor Co. v. Union Motor Sales Co.,** 156 C.C.A. 584, 244 Fed. 156;

**Chicago Flexible Shaft Co. v. Katz Drug Co.** (D.C. 1934), 6 F. Supp. 193, appeal dismissed in C.C.A. 3, 1934, 72 F. (2d) 548;

**Katz Drug Co. v. W. A. Sheaffer Pen Co.,** (D.C. 1933) 6 F. Supp. 212.

The first state law legalizing resale price fixing contracts was passed by the state of California in 1933. By 1936 there were twelve such state statutes (Senate Report No. 879, 75th Congress, recommending enactment of Miller-Tydings Amendment). In that year the Supreme Court of the United States, as then constituted, upheld by Mr. Justice Sutherland, the constitutionality of these statutes in the Seagram case and others cited in plaintiff's brief.

The constitutionality of the state acts being thus decided as to intrastate transactions, the momentum of the retailers' lobbies, and especially of the Retail Druggists' Association, enacted fair trade laws in many more states during the year prior to the Miller-Tydings Amendment. **(Bristol-Myers Co. v. Lit Brothers, Inc. (No. 1),** 33 D. & C. 52, 63, 67).

But there was one fly remaining in the druggists' ointment which is stated thus in Senate Report No. 879, supra:

"Though there is no specific adjudication on the subject, it is believed that contracts stipulating minimum **resale** prices, even when they are made or are to be performed in a state where such contracts are lawful, may violate the Sherman Act whenever the goods **sold** under the contract move in interstate commerce.

"Consequently many manufacturers not domiciled in the state of the vendee are not willing to run the risk of violating the Federal law, and the effectiveness of the state fair trade laws is thereby seriously impaired."

(Boldface ours)

Here, then, was the situation Congress was seeking to remedy by the amendment. It was simply the doubt as to the legality under the Sherman Act of contracts of **sale** specifying **resale** prices between a manufacturer in one state and retailers in another state, which involved the shipment of the goods **sold** from the state of the manufacturer to the state of the retailer for resale in the latter state, which shipment would be in interstate commerce, and therefore subject to the Sherman Act.

This situation, as set forth by the framers of the amendment, certainly called for no extension of the law of any state to resale transactions and advertisements taking place in other states; nor for the enactment of a federal trade law which would constitute such an extension of the state law.

The authors of the Miller-Tydings Amendment in their Report (supra) have made it as clear as the

English language is capable of being, that it was not their intention to draft a federal fair trade act:

> "In recommending the passage of S.3822, the committee, while fully recognizing the evils of loss-leader selling, is not required to determine the effectiveness of the device adopted by the States to eliminate the same * * *.
>
> "The Congress is not called upon to pass upon the effectiveness of the remedy, but should not put obstacles in the way of efforts of the individual States to make the remedy effective."

The committee then sets forth what the obstacles were:

> "Though there is no specific adjudication on the subject, it is believed that contracts stipulating minimum resale prices, even when they are made or are to be performed in a State where such contracts are lawful, may violate the Sherman Act whenever the goods sold under the contract move in interstate commerce.
>
> "Consequently, many manufacturers not domiciled in the state of the vendee are unwilling to run the risk of violating the Federal law, and the effectiveness of the State fair-trade laws is thereby seriously impaired."

The Committee goes on to state that the Miller-Tydings Amendment was designed to remove the Sherman Act as an obstacle in this doubtful situation:

> "S.100 removes the doubt as to the applicability of the Sherman Act by expressly legalizing such contracts where legal under the laws of the

state where made or where they are to be performed."

This is definitely not an expression of intention that the amendment is to be a federal fair trade act, itself taking up where the state acts leave off and regulating resale price maintenance. The purpose is simply **to remove the Sherman Act as an obstacle to the state acts in the situation set forth.**

The Committee several times repeats this purpose, and unmistakably declares that in enacting the amendment Congress is not called upon to pass upon the merits of the state statutes, and is not establishing a national policy on fair trade:

> "But most important from the standpoint of the Congress, the proposed bill merely permits the individual states to function, without Federal restraint, within their proper sphere, **and does not commit the Congress to a national policy on the subject matter of the State laws.**"
>
> (Boldface ours)

In the debate on the amendment on the Senate floor, **Senator Austin** (who sat on several committees which considered prior versions of the Miller-Tydings Act which failed to be enacted as independent bills) echoes the same denial that the amendment is an expression of Congressional policy for the nation, i.e., a federal fair trade act:

> "* * * Here is a measure which recognizes our form of government. Here is a measure which says 'We will not go into the State of Vermont with a regulation of prices from any other state

in the Union or from Washington, unless the State of Vermont is willing to have it done.' It is that freedom which is left by this measure and expressly sanctioned by it—that freedom of every State in the Union to declare its own policy with respect to its own domestic affairs which appeals to me most strongly."

(Congressional Record, Vol. 81, Part 7, p. 7496.)

And in the same debate, Mr. Tydings himself stated:

"What we have attempted to do is what 42 states have already written on their statute books. It is simply to back up those acts, that is all; to have a code of fair trade practices written not by a national board such as the N.R.A., but by each state so that the people may go to the State legislature and correct immediately any abuses that may develop. **We are trying to decentralize fair trade practices rather than to have the matter dealt with under the old N.R.A., which tried to put one blanket over the whole country** * * *."

(Boldface ours)

The above quotations argue for themselves. In the face of them it is indeed vain to argue that Congress adopted any positive fair trade law or policy which would apply to interstate commerce as an extension to the state fair trade acts. Its declaration in the amendment is rather a negative one, i.e., the Sherman Act does not apply, and that obstacle is removed in the situation specified, i.e., in the shipment from manufacturer to retailer.

**4. Does the Miller-Tydings Amendment extend the State Acts to cover transactions in other States?**

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Nor does the amendment extend the area of application of the state laws to resale transactions and advertisements taking place in other states and foreign countries. The quotations already made in this brief from the Committee Report and the debate on the Senate floor are enough to establish this point. First, when it was denied that Congress was passing on the merits or effectiveness of the state laws, or establishing any policy either for or against resale price maintenance, that denial must mean that Congress was not by the amendment either setting up a federal trade law to control in interstate commerce, or permitting any one state to do so. To do either one would require an expression of policy by Congress on the subject, otherwise the act of Congress is capricious and arbitrary, and unconstitutional, which is not to be presumed.

Second, there are numerous indications in the amendment, report and debate that the area of applicability of the state statutes contemplated by Congress was intrastate transactions. The amendment itself, as previously pointed out, exempts contracts from the Sherman Act "when contracts or agreements of that description are lawful as **applied to intrastate transactions** under any statute * * * in any state * * *." As already indicated, the report states the purpose of the state acts to be to eliminate "loss leader" retailing, a purely local form of predatory competition which arose during the depression and prompted the state

acts. To prevent a cut rate store in Philadelphia from luring the customers from, and eliminating the competition of, another drug store across the street, or across town by engaging in "loss leader" selling, would not require the prevention of a man in a room over the cut rate store, of whose presence the customers below were not even aware, from mailing the same articles to customers outside the state entirely. How can these sales of the latter injure anyone of the above parties? We are not now speaking of his advertisements in Philadelphia or Pennsylvania, nor sales there, but only those transacted outside the state. When Congress contemplated "loss leader" practices, it contemplated a local practice, and a preventive of local application. Again the report contemplates intrastate application of state laws when it states:

> "But most important, from the standpoint of the Congress, the proposed bill merely permits the individual states to function, without Federal restraint, **within their proper sphere,** and does not commit Congress to a national policy on the subject matter of the state laws."
>
> (Boldface supplied)

And to repeat Senator Austin's statement in debate " * * * that freedom of every state in the Union to declare its own policy with respect to its own domestic affairs which appeals to me most strongly." The "proper sphere", "its own domestic affairs", "intrastate transactions"—these are not terms which suggest an intent to silently broaden the applicability of the laws of any one state to cover transactions occurring

outside the state, and carried on entirely by means of the United States mails.

Third, the report and debate demonstrates that there was no intention to broaden this area of application of the state law. As interpreted for us by these records, there is not one word in the amendment which would permit the Pennsylvania statute to apply to resale transactions made in other states. The clear meaning of the amendment is to the exact contrary:

> (Section 1 of the Sherman Act shall not render illegal) "contracts or agreements prescribing minimum prices for the resale of a commodity * * * when contracts or agreements of that description are lawful as applied to intrastate transactions, **under any statute * * * now * * * in effect in any State * * * in which such resale is to be made or to which the commodity is to be transported for such resale * * *.**"
>
> (Boldface ours)

It is plainly the law of the state **where resale is made, or to which the commodity is transported for resale** which determines whether the contract is lawful as applied to intrastate transactions within its borders, and consequently whether it is exempted from illegality under the Sherman Act. In other words, when respondent's resale and shipment for resale of petitioner's product is made in Vermont or Missouri or Texas or Florida or the District of Columbia or Mississippi or New York or Ohio, it is the law of that state which determines the legality of the transaction and not the State of Pennsylvania. If the law of either

state is extended in any way by the amendment (which we do not concede), it is the law of those states and not of Pennsylvania, which apply to the respondent. There is no authority for the opposing position, including the Pepsodent case. There is no statement in that case as to how the defendant was engaged in interstate commerce, but it is indicated that it must have been by reselling into the state of Louisiana, since the contention of plaintiff was upheld that Congress did not intend

> "to leave that subject **in the same locality** governed, in a hybrid fashion, by local law as to the activities of contracting retailers and by federal law as to the **competing** activities of non-contracting retailers".
>
> (Boldface ours)

Interstate commerce includes transactions into, as well as out of, a state. It is our contention that if the amendment did extend the law of any state over non-signers engaged in interstate commerce, it was the law of the only state which could say that the resale took place within its borders and was therefore the state in which the resale was made or into which the article was shipped for such resale.

If the rule were as the petitioner contends, i.e., that the Pennsylvania statute on which it bases its suit exclusively, governs sales made in all other states, then the very feature of the freedom of each of those other states to adopt its own laws and policy, which the committee emphasized and which appealed so strongly to Congress, is denied. Nor is this a mere theoretical encroachment upon the jurisdiction of the other states.

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The fair trade laws in the various states differ in a number of essential particulars, which would under the corporation's thesis, be in conflict. In 24 states the statutes provide that a person other than the owner of the trade mark may establish the prices; in 24 any other person may not. In 42 states a non-contracting retailer must abide by the prices; in 6 he need not. In 16 states the statutes authorize a minimum resale price; in 26 an absolute price is required. In 29 states sales are not exempted from the operation of the statutes when the trade mark or name is obliterated; in 13 they are. Wisconsin does not exempt sales made under order of court; the others having statutes do so. There are many differences in requirements among the state acts as to notice to the public, and to the distributor, and whether or not an opportunity must be given the distributor to repurchase the stock in the hands of a retailer, before the retailer may hold a closing-out sale. Four states never had fair trade acts, and in one the act was declared unconstitutional last year. (See tables setting forth the above provisions by states in 2 CCH "Trade Regulation Service" 7011-7013). Furthermore, the Miller-Tydings Amendment gives effect to future state fair trade acts of undetermined content when it states: "* * * under any statute, law, or public policy now or **hereafter in effect** in any state * * *." In view of this provision, it is impossible to predict how the areas of divergence and conflict in the state laws will be multiplied. It is unlikely, to say the least, that Congress intended to extend the present and future acts of any one state with all the then-existing differences known to Congress and of varying degrees of

conflict from state to state, into the jurisdictions of all other states. At any rate, if it did so, it was guilty of the purest hypocrisy when it declared its purpose to be to leave each state free to determine its own laws within its own sphere and to control its own domestic affairs.

In 2 C.C.H. Trade Reg. Ser. 7982, it is said:

> "Even when the **contracting dealer** is engaged in interstate selling, the legality of the contract rests with the law of the state in which the resales are made. The question becomes one of fact as to where the sales were made. The rule may be generally stated that the sale is made at the place where the title passes, or where the last act necessary to complete the contract of sale is performed."

At page 7117 the opinion is expressed:

> "**Non-contracting dealers,** not being under a contractual liability, are forced to maintain established prices only if they are subject to state statutory prohibitions. It seems that interstate sales should not be held subject to the prohibitions of any state law."

(Boldface ours)

Our position coincides with the above opinion, that is, that the Miller-Tydings Amendment made no extension of the laws of any state; and that assuming, arguendo, that it did extend the laws of any state, it was the law of the state where the resale is made, or where the goods are transported for such resale.

The New York Supreme Court has decided that the state within which the final resale is made is the one which has jurisdiction over the transaction and may control it by Fair Trade Law, according to the meaning of the Miller-Tydings Amendment. **Calamia v. Goldsmith Bros., Inc.,** 82 N. Y. Supp. 2nd 277.

An opinion of the Attorney General of the State of New York premises this same conclusion. It is his opinion that the Fair Trade Law of New York expressly exempts sales to the state government from the application of any agreement restricting resale prices. Since the Federal law (Miller-Tydings Amendment) sanctions price fixing agreements in interstate commerce only where permissible in the state of resale, it follows, in his opinion, that an attempt to fix prices on sales to the state would also violate the Federal antitrust laws and be unenforceable.

Opinion of the Attorney General of New York, November 14, 1949 (C.C.H. Trade Cases 1948-1949, Paragraph 62, 516).

The court is not now confronted with a contract which might have been made to apply to transactions in other states, or with a suit founded on the laws of the states and countries where resales were made and to which the goods were shipped for resale. The corporation stands on the Pennsylvania statute alone, and on that of no other state, and demanded a "sweeping injunction" (against sales and advertisements of respondent in all states and in other nations) against these transactions of respondent, which it alleges are violations of the law of Pennsylvania. This contention can not be sustained.

## B.

**Petitioner argues for judicial extension of scope of Miller-Tydings Amendment and fair trade laws.**

---

If, as petitioner contends, the state fair trade laws, construed according to their manifest purpose, are not fully in accord with economic reality, which is not admitted, petitioner's forum is Congress, and not this Court. Certainly, it should not seek to lead this Court to a decision directly contrary to the intention of Congress, as set forth in the Amendment itself, in Committee and on the floor of the United States Senate. Thus, if a national fair trade act is needed and desired, let it be one uniform act enacted by Congress covering all interstate transactions, and not by judicial extension of the statute of any one state into all other states and foreign countries.

The Circuit Court clearly saw the conflicts which would result from incursions into all other states with the Act of one state.

It must be recognized, of course, that there is no unanimity of opinion in support of Petitioner as to the economic value or desirability of resale price maintenance. The Federal Trade Commission in the Commission's Summary and Conclusion on Resale Price Maintenance, 1945, concluded:

> "The Commission believes that the consumer is not only entitled to competition between rival products but to competition between dealers of a single product."

Furthermore, not all of the states have enacted fair trade laws, and the recent decision of the Florida Supreme Court in **Liquor Stores, Inc. and Webb City, Inc. v. Continental Distilling Corp.**, 40 So. (2d) 371, Fla. (1949) the court attacks the very philosophy behind such laws, pointing out that the laws were conceived under an entirely different set of economic circumstances from the normal ones which now prevail.

The Florida court found the act not to be within the scope of the state's police powers because it constituted an unjustifiable denial of the right to own and enjoy property, and because it extended the sovereign power of the state to one economic group, i.e., manufacturers, to the detriment of all other citizens, thereby constituting a violation of the due process clause of the state constitution. In connection with this point, Adams, C. J., finds that the question may no longer "be regarded as fairly open to differences of opinion", as was said in the Seagram opinion, **Old Dearborn Distributing Co. v. Seagram's Distillers' Corp.**, 299 U. S. 183, 196, 57 S. Ct. 139.

> "Many of the precedents from other jurisdictions on similar acts were made upon the proponents' statement that the general welfare would be served. The exact contrary is now perfectly apparent as will appear from a study of Summary and Conclusion of the Federal Trade Commission, December 13, 1946. (P. 375)
>
> "It is also well to note that when this type of law was first promulgated its purpose was to protect long established brands which had acquired

a substantial value. As time passed and one court after another approved them, perhaps because another court had, little if any inquiry was made of the original purpose. Now new brands by the thousands are created overnight to get the advantage of the act. It is well to remember also that this act applies to every kind of article including such necessities as food and drugs. In that connection it is enlightening to read fully the Summary of the Federal Trade Commission relative to the means employed by certain retail groups to coerce the manufacturers to fix prices for the retailer's benefit and to the detriment of both the manufacturer and the consuming public."

And Hobson, J., declared, in a concurring opinion:

"The validity of such legislation can be founded only upon, what was termed in the ancient days of the Roman Empire, the summum bonum—the greatest good for the greatest number—and what we now call general welfare. It is solely upon such premise that a legislative enactment, which is flagrantly violative of the established law of contracts, which destroy initiative on the part of the retail merchant and affects adversely the economic life of the common man and which portrays monopolistic, if indeed they are not communistic, tendencies, can be sustained. Under normal conditions such legislation is not consonant without philosophy and fundamental principles of government as I understand that philosophy and those principles. It is not truly a 'Fair' Trade Act so

far as its effect upon the consuming public is concerned, but actually it is 'unfair' and unconstitutional."

From the vantage point of many years of actual experience under these laws, there does not exist any room for "differences of opinion." As the Federal Trade Commission in its Summary and Conclusion on Resale Price Maintenance of 1945 states at page lix:

> "One of the principal arguments advanced for the legalization of resale price maintenance was that it was needed to enable manufacturers to control undesirable leader merchandising and 'sales below cost'. Proponents emphasized extreme price wars and the impression was created that before resale price maintenance became effective many nationally advertised brands were sold, especially by chain stores, and other large distributors, at or below invoice cost. In general, sales below invoice cost are exceptional. The records of chain stores, department stores, and super markets examined in the present inquiry indicate that although the average prices of such large distributors often were lower than those of independent stores before resale price maintenance became effective, those lower prices yield substantial gross margins over invoice cost of goods in all market areas visited * * *.
>
> "The 'sales below cost' argument yields itself to over-emphasis because it is indefinite in meaning unless 'cost' is fully defined. In the hands of strongly organized groups of retailers, resale price

maintenance fits well into plans to restrict price competition and enhance prices to levels yielding margins adequate to cover distribution costs desired by organized pressure groups * * *.

"The conclusion of the Department of Justice is that the actual effects of resale price maintenance have been those which are to be expected from private price fixing conspiracies unregulated by public authority, whether or not they enjoy the sanction of law. The department has further stated it to be its belief that if its Antitrust Division had sufficient men and money to examine every resale price maintenance contract written under State and Federal legislation, and to proceed in every case in which the arrangement goes beyond the authorizations of the Tydings-Miller Amendment, there would be practically no resale price maintenance contracts, and that in the absence of such wholesale law enforcement, the system of resale price legislation fosters restraints of trade such as Congress never intended to sanction * * *.

"The essence of resale price maintenance is control of price competition. Lack of adequate enforcement of antitrust laws leaves a broad field for the activities of organized trade groups to utilize it for their own advantage and to the detriment of consumers. The expenses of State and local fair trade committees, all of which are trade managed and trade financed, tend to increase or to prevent decreases in distribution costs. Manufacturers and dealers alike contribute to the ex-

pense of these committees for shoppers and investigators to obtain evidence of violations of prices and to pay lawyers employed by the committees in prosecution of cases * * *. The net result in enhancement and maintenance of high living costs is no less real because it is concealed in the prices at which goods reach the consumer in such a way that it is not subject to direct measurement."

Hobson, J., in his concurring opinion in the Florida opinion thus presents the viewpoint of the public:

"The very technical and finespun theory of vertical contracts as differentiated from those which are horizontal does not appeal to, satisfy nor indeed protect the average citizen. He does not appreciate nor understand why the interest of the consuming public, which group is comprised of a vast majority of our people, should be subservient to the property right of the individual owner of a trade-name, mark or brand. It appears to the writer that his reasoning is sound. Admitting the existence of such property right the welfare of the 'greatest number' should take precedence over that of a favored few if a choice must be made which will invade or infringe the constitutional guaranties of either group. The average citizen of whom I speak, the common man, if you please, believes in free enterprise, that 'competition is the life of trade', and that the principles of supply and demand and of building a 'better mouse-trap' have contributed in no small measure to making this Nation great."

Petitioner has presented to this Court a heart-rending picture of the calamitous position in which it now finds itself following the decree of the Circuit Court! But, if petitioner's contention that the law of the state of the residence of the retailer controls over those of all other states is accurate, then the respondent, and indeed any other enterprising mail-order business man, could operate without compliance with a fair trade law, selling into every state in the Union, by the simple expedient of conducting his mail-order business from the District of Columbia, Vermont, Missouri or Texas, where no fair trade laws have been enacted.

In fact, mail-order sales have not, and will not, destroy "equitably enforceable price structures." It is common knowledge that discount houses using an unlimited membership basis to circumvent the fair trade laws are flourishing, and retailers like the respondent are operating out of the non-fair trade law states. Yet, there seems to be enough "equitably enforceable price structure left to make it worth Petitioner's effort to carry this case to the nation's highest Court. The truth of the matter is that mail-order business is not a serious competitor of the local retail store business. In this connection it is well to note that Petitioner's statistics set forth on page 34 of its brief are somewhat weighted in its favor, for, in order to produce a figure of "one-fifth of all retail business, namely, $27,188,000,000", it included the sales of chain stores which are local stores dealing in intrastate sales so far as this case is concerned.

Petitioner has completely ignored the original purpose of the pertinent statutes and has predicated much

of its argument upon questionable economic theories which are advanced for the purpose of aiding the manufacturer, but not the public.

Our nation today is faced with the ever present threat of inflation, and great effort is now being exerted toward the urgent problem of holding down and rolling back prices. The fair trade laws have, for years, been an obstacle to such efforts, since their tendency must be to eliminate competitive pricing and to maintain abnormally high prices. We urge this Court to deny the petition before it and thereby refuse to lend encouragement to those who seek judicial extension of the scope of the Miller-Tydings Amendment and fair trade laws, which, as a matter of law and public policy, should not be construed to be broader in their application than originally intended by the Congress or state legislature respectively.

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## V.

## CONCLUSION

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For all of the foregoing reasons, respondent urges your Honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,
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GILBERT NURICK,
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April 2, 1951.

MAY 21 19
CHARLES ELMORE

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1950

## No. 538

SUNBEAM CORPORATION, a Corporation.
*Petitioner.*

VS.

S. A. WENTLING,
*Respondent.*

**SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.**

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IN THE

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No. 538

SUNBEAM CORPORATION, a Corporation.
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*Respondent.*

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable The Chief Justice and the Associated Justices of the Supreme Court of the United States:*

Pursuant to permission granted by the Court on May 25, 1951, Sunbeam Corporation herewith submits this, its Supplemental Brief, in support of its Petition for a Writ of Certiorari to review a decision of the U. S. Court of Appeals for the Third Circuit which vacated a decree of the District Court of the United States.

**Basis of application for leave to submit Supplemental Brief.**

Since the Petition for Writ of Certiorari was submitted in this case, the Court has handed down its decision in the *Schwegmann Brothers, et al.* v. *Calvert Distillers Co.* and *Schwegmann Brothers, et al.* v. *Seagram Distillers Corp.*, respectively numbered 442 and 443—October Term 1950, ..... U. S. .....; 19 U. S. Law Week 4301, thus bringing into existence additional considerations particularly affecting this case.

The *Schwegmann* decision, while approving "contractual" fair trade in interstate commerce, leaves unanswered certain considerations absolutely vital to fair trade. Since such considerations are involved in the instant case, those problems should be answered in the interests of setting at rest the present great commercial uncertainty as to the permissible scope of fair trade contracts and the lawful methods of protecting such contracts.

Indeed, during oral argument of the *Schwegmann* cases, counsel for both parties, in reply to questions from the Court, admitted that their cases presented different issues than the Sunbeam case.

## ARGUMENT.

### I.

**The decision of this court in the Schwegmann case overrules that part of the decision of the Circuit Court of Appeals in this case holding that state fair trade acts would be unconstitutional if considered as affecting interstate commerce.**

Respondent in this case advertised Petitioner's fair-traded products in national magazines. The District Court enjoined Respondent from violating Petitioner's fair trade contracts, particularly pointing out that:

> "This defendant did not advertise merely a razor for sale, he advertised a "Shavemaster" [Petitioner's registered trade-mark] electric razor. By so doing he has invaded a right that this plaintiff has been given by the Fair Trade Act of the Commonwealth of Pennsylvania in respect to a sale made under the terms of that Act and that trade-mark must be kept inviolate whether the sale is intrastate or interstate."

The Circuit Court reversed partially, and ordered that the Injunction be limited solely to intrastate transactions in Pennsylvania, on the ground that to give interstate application to the Pennsylvania Fair Trade Act, under the sanction of the Miller-Tydings Amendment, would be to give an unconstitutional effect to Miller-Tydings.

This Court has now, in the *Schwegmann* case, upheld the Miller-Tydings Amendment as permitting interstate application of *contracts and agreements* entered into under state fair trade laws. Therefore, to that extent, the decision of the Third Circuit Court of Appeals is erroneous and inconsistent with the decision of this Court, and must be reversed on that ground.

## II.

**Even though the Schwegmann case holds that a manufacturer may not compel a non-signer to be bound by its fair trade contracts, the manufacturer, as trade-mark owner, is not precluded from taking proper action to protect its trade-marks.**

Petitioner's Complaint in the District Court, although not divided into separate counts, proceeded on two theories.

The principal theory of *Sunbeam's* case was to enjoin a continuing injury to its registered trade-marks "Sunbeam" and "Shavemaster". Petitioner's other theory rested on the non-signer provisions of the Pennsylvania Fair Trade Act.

Regardless that this Court has now held that the non-signer provisions do not apply in interstate commerce, there is not one word in the *Schwegmann* case which indicates that the vast body of law sustaining the right of the trade-mark owner to take all reasonable steps to protect his valuable property in such trade-marks and to prevent unauthorized use of his trade-marks has been impaired.

Judge Follmer of the District Court expressly recognized this aspect of Petitioner's case below, when he said:

> "This defendant did not advertise merely a razor for sale, he advertised a 'Shavemaster' electric razor."

Under the *Schwegmann* decision, if any non-contracting dealer somehow obtains the ownership of an article manufactured by Petitioner, he may resell it in interstate commerce if he sees fit and without regard to Petitioner's fair trade contracts. But we think it is going much further to say that in addition to such sale he may deliberately and

without permission advertise and use the trade-mark of Petitioner to accomplish his purpose.

By electing to merchandise under the fair trade system (which requires trade-marked goods as a basic condition) the manufacturer authorizes the retailer who enters into a fair trade contract to use his trade-mark (and the good will, national advertising, and the manufacturer's product guarantee that goes with it) as a principal aid in selling to the ultimate consumer. Conversely, by merchandising under a fair trade system, the manufacturer withholds permission to use his trade-mark from non-contracting dealers.

It is, therefore, respectfully submitted that, in the light of the *Schwegmann* decision, Respondent Wentling as a non-contracting dealer had only the right to advertise an "electric razor" and that he had no right, either by advertisement, correspondence or conversation, to use or invoke Petitioner's trade-marks "Sunbeam" or "Shavemaster" to aid him in making such sale.

If the Injunction of the District Court is to be modified, then the Injunction should be that Respondent Wentling may not in any manner in intrastate transactions within the State of Pennsylvania violate Petitioner's fair trade contracts, and as to transactions in interstate commerce, that he may not advertise Petitioner's trade-marks "Sunbeam" and "Shavemaster" nor offer to sell, or sell any of Petitioner's products which Respondent Wentling may come to own, without first obliterating or removing Petitioner's trade-marks from the products, and removing the products from cartons bearing Petitioner's trade-marks.

## III.

### Problems created by the Schwegmann decision.

After careful study of the opinion of the Court, it is most respectfully urged that, in addition to the previously specified grounds for the granting of the present Petition, it should be granted in order that the Court may, by its further opinion, expel the confusion and misunderstanding which have followed its holding in the *Schwegmann* case.

**A. Resort to a state court, or to a federal court applying state law, for the protection of a right provided by a state statute is not conduct prohibited by the Sherman Act.**

A particularly perplexing problem which, it seems to us, results from that holding is whether or not its effect is to preclude, as a violation of the Sherman Act, a non-resident trade-mark owner from resort to the court of a state for protection of rights afforded by state fair trade laws.

It is clear from the opinion in the *Schwegmann* case, that, under the Miller-Tydings Act, it is lawful for an out of state manufacturer or distributor to enter into fair trade contracts with vendees in those states which have fair trade statutes. It also appears to be clear from the same opinion that it would be lawful for such a manufacturer or distributor to go to court to enforce *the contracts* against violation by any such vendee.

*But, to the full extent of the facts stated in the Schwegmann opinion, it would appear that such manufacturer or distributor, by the mere act of application to a state court of justice for redress against a non-signer of a wrong defined by state law (the unfair competition denominated in the non-signer clauses), would thereby suddenly be involved*

*in an "interstate marketing arrangement" declared in the opinion to be clearly illegal under the Sherman Act.*

*If this be the effect of the decision in the Schwegmann case, it seems to us that the reach and scope of the commerce clause have been so extended as literally to subject all intra-state commerce to control under the Sherman Act, regardless of what the law or public policy of a state may be. And, we believe, if such is the holding in the Schwegmann case, serious problems are precipitated with respect to the constitutional provisions assuring equal protection of the law. (Fourteenth Amendment, Section 1.)*

That these consequences are involved follows, it seems to us, from a consideration of this Court's unanimous decision in *Old Dearborn Distributing Co.* v. *Seagram Distillers Corporation* (1936), 299 U. S. 183. There, sustaining the constitutionality under the federal constitution of the nonsigner clause of the Fair Trade Act of Illinois (and upon the same authority, that of the Fair Trade Act of California, in *Max Factor & Co.* v. *Kunsman* (1936), 299 U. S. 198), this court declared, in the concluding paragraph of its opinion, that:

> "The sole purpose of the present law [the Illinois Fair Trade Act] is to afford a legitimate remedy for an injury to the good will which results from use of trade-marks, brands, or names." (299 U. S. at 198.)

This purpose and effect of the fair trade statute was emphasized earlier in the same opinion when the Court pointed out that nothing in the Fair Trade Acts precludes:

> "the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end." (299 U. S. at 195).

*Since, as we read the Schwegmann opinion, it is clear that fair trade contracts operative within states sanctioning them may lawfully be entered into by out of state trade-mark owners and since the clear implication of the opinion is that such contract rights may be enforced by the out of state trade-mark owner against the signing vendee, it is difficult to understand just how resort to a state court for protection against non-signers of rights growing out of that lawful conduct suddenly brings the Sherman Act into play to convict the out of state trade-mark owner and subject him to the serious penalties imposed by the Sherman Act.*

May we define this a bit further? Broad as is the reach of the Sherman Act, a retail sale of a trade-marked product, out of stock held and owned by a corner druggist in a small city in the center of Pennsylvania—surely that retail sale alone is not interstate commerce. And surely it is within the power of the State of Pennsylvania, so far as the commerce clause of the federal constitution is concerned, to make reasonable regulations or provisions applicable to such sale.

The Legislature of the State of Pennsylvania has provided by its fair trade act that if such a sale is wilfully and knowingly made at less than the price stipulated in a contract executed under the sanction of the statute, it is actionable unfair competition. The highest court of the State of Pennsylvania, interpreting and applying the statute has found it reasonable, and referred to an antecedent decision of this Court in doing so (*Lentheric, Inc.* v. *F. W. Woolworth* (1940), 338 Pa. 523, 13 Atl. 2d 12).

Under these circumstances, the right of a local trade-mark owner within Pennsylvania to seek redress under the non-signer clause of the fair trade act of that State is surely

clear. And if all the commerce involved is local within Pennsylvania, such application to the Court could not conceivably constitute a violation of the Sherman Act. Yet, as we read the *Schwegmann* case, if a *non-resident* trademark owner, having made conceivably lawful contracts giving rise to the cause of action of unfair competition, should come to Pennsylvania and initiate such a suit within that State, the non-resident would be guilty of crime under the Sherman Act, merely because of the application to the state court (or to a federal District Court) for the equitable relief provided by the state statute. This, we submit, would result in denial of equal protection of the law.

It seems to us that this can hardly have been intended to be the result of the holding in the *Schwegmann* case; at the same time, so far as the facts are stated in the opinion of this Court in that case, it does appear to be the result.

**B. The Schwegmann decision casts doubt upon common law and statutory remedies.**

It would seem to us that neither the briefs nor the oral argument in the *Schwegmann* case brought to the consideration of the Court all of the materials involved, including the substantial body of case law which has developed, and the actual economic functioning of the fair trade laws. Without the benefit of such matters, the decision in the *Schwegmann* case is necessarily incomplete and has created more problems in an important segment of the commercial structure of this country than it has settled.

1. In upholding the Miller-Tydings Act, *as applied to contracts and agreements,* it must be assumed that the Congress intended useful contracts and agreements, but they can only be effective and useful if they can be enforced. It would be inequitable to and no court

would enforce the contract against a contracting retailer if his competitor may freely undersell him. The *Schwegmann* case says that such contracts cannot be enforced or protected by resort to the non-signer clauses of the law. The vital question then remains—To what other legal remedies may fair trade contracting parties resort in order to protect and enforce their contracts?

2. Does the *Schwegmann* case deprive the trade-mark owner of the common law remedy against tortious interference with contract relations by third parties?

3. Does the *Schwegmann* case deprive the trade-mark owner of the common law doctrine regarding equitable servitudes, which permits buyer and seller by contract and agreement to impose restrictions upon the property sold, which restrictions become binding upon subsequent non-contracting purchasers?

4. Does the *Schwegmann* decision permit a third party, without the consent or agreement of the trade-mark owner, to invoke and use such trade-mark for the purposes of his own gain and to the injury of the good will attached to such trade-mark?

5. Since for all practical purposes the overwhelming majority of sales of manufactured merchandise to the ultimate consumer in the United States involve, at some point or another, a movement in interstate commerce, does not the *Schwegmann* decision destroy the cooperative plan established between the federal Miller-Tydings Amendment and the state fair trade acts to establish a system under which such commerce may proceed in an orderly manner?

Fortunately, these questions are all presented by the instant case and it is of the utmost importance that those engaged in the vast portion of commerce built up in the manufacture and sale of nationally known and advertised standard brand merchandise know for a certainty what their rights and duties are under the law.

Such problems and considerations were heretofore considered by this Court and, as a matter of fact, were effec-

tively presented in the brief of Messrs. Rogers, Haves, Weigel & Loos on behalf of appellees in the case of *Max Factor & Co.* v. *Kunsman,* 299 U. S. 198. It would have been helpful to the *Schwegmann* case had these matters and the long established legal background therefor been again brought to the attention of the Court.

**Conclusion.**

It is, therefore, respectfully submitted that in the light of the decision of the *Schwegmann* case, the decision of the Third Circuit Court of Appeals in this case is not correct and should be reviewed; and we, further, most respectfully urge the granting of the present Petition in the interests of clarifying the situation so that the great numbers of individuals and businesses throughout the United States to whom the protection of trade-mark rights is important may be relieved of uncertainty with respect to the scope of what they may lawfully do for the preservation and protection of their symbols of good will.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

NO. 538

SUNBEAM CORPORATION, a Corporation,
Petitioner,

v.

S. A. WENTLING, Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and Brief in Support Thereof.

## BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF PETITION

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## BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF PETITION.

The Commonwealth of Pennsylvania adopts the brief heretofore filed by the petitioner in this case, but submits additional facts to show that Pennsylvania has a direct and substantial interest in the questions involved in this case.

## STATEMENT OF THE CASE.

The Pennsylvania Fair Trade Act of June 7, 1935, Pamphlet Laws p. 266, as amended by the Act of June 12, 1941, P. L. 128, 73 Purdon's Penna. Stat. Secs. 7 and 8 (quoted in Appendix D, page 21a, of Petitioner's brief), is substantially the same as the Fair Trade Act of Louisiana, which is involved in *Schwegmann Brothers v. Calvert Distilleries Corp.*, No. 442 and *Schwegmann Brothers v. Seagram Distilleries Corp.*, No. 443, of October Term, 1950, in which certiorari was granted on February 26, 1950.

Pennsylvania is an industrial state. Its vast production of raw materials and supply of skilled labor provides facilities for the manufacture of innumerable trade-marked and branded articles which are sold and shipped into all the states of the Union. If the Pennsylvania Fair Trade Act is limited by construction to sales made within its territorial limits, as the Court of Appeals ruled in this case, its industries could not develop the quantity of production and lower costs or provide the funds for research and improving the quality of an article, which are made possible by a larger volume of sales. By far the greater portion of the trade-marked and branded articles produced in Pennsylvania are sold to purchasers in other states, which have Fair Trade laws. Ability of the Pennsylvania manufacturer to stabilize the price of his article is necessary to protect the quality and efficiency of his products and does not confer upon him a monopoly. His product is still obliged to meet the keenest competition of other manufacturers of similar articles.

## ARGUMENT.

Forty-five states, including Pennsylvania, have enacted Fair Trade laws, which provide that—

(1) The purchaser of an article bearing a trade-mark or brand shall not resell at less than a price fixed by the seller, and that the purchaser in the event of a resale by him, will require the same agreement from the party purchasing from him;

(2) A buyer who knows of this price restriction may not resell at a lower price, whether or not he is a party to such an agreement.

In order to remove the prohibition of the Sherman Anti-Trust Act from, and to permit each state to adopt its own policy as to, such contract, Congress enacted the Miller- Tydings Amendment to the Sherman Anti-Trust Act. This amendment provided that the provisions of the Sherman Anti-Trust Act should not render illegal agreements prescribing minimum prices for the resale of a trade-marked or branded article—

> "* * * when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition * * *." (Quoted on page 20a of Petitioner's brief.)

The purpose of this amendment was clearly and authoritatively stated in Report No. 382 submitted by the Committee on the Judiciary to the House of Representatives and recommending the adoption of this amendment.

This report stated:

*"The sole objective of this proposed legislation is to permit the public policy of States having 'fair trade acts' to operate with respect to interstate contracts for the resale of goods within those States.* The fair-trade acts referred to legalize the maintenance, by contract, of resale prices of branded or trade-marked goods which are in free competition with other goods of the same general class.

"To accomplish this end, the reported bill amends section 1 of the Sherman Antitrust Act which declares every contract in restraint of trade illegal. The amendment adds a sentence to the section, in the nature of a limitation, to the effect, in substance, that nothing therein contained shall render illegal contracts prescribing minimum prices or other conditions for resale of branded or trade-marked goods when such contracts are lawful as to intrastate transactions under the State law of the State in which the resale is to be made; and that the making of such contracts shall not be an unfair method of competition under section 5 of the Federal Trade Commission Act.

* * * * * * *

"State fair trade acts typically provide, first, that contracts may lawfully be made which provide for maintenance by contract of resale prices of branded

or trade-marked competitive goods. Second, that third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.

* * * * * * *

*"Your committee respectfully submit that sound public policy on the part of the Federal Government lies in the direction of lending assistance to the States to effectuate their own public policy with regard to their internal affairs. It is submitted that this is especially true where such assistance, as in this instance, consists of removing a handicap resulting from the surrender of the power over interstate commerce by the States to the Federal Government."* (Italics added)

This Miller-Tydings Amendment is purely *permissive.* It removes any doubt as to the legality of contracts fixing minimum prices in so far as the Sherman Anti-Trust Act and the policy of Congress are concerned. Legislation by a state is still necessary to remove illegality under the common law and to provide means of enforcement.

Technically the Miller-Tydings Amendment establishes an exception to the Sherman Anti-Trust Act; but fundamentally its purpose was to make it possible for each state to formulate its own public policy with reference to price restriction upon the sale of trade-marked or branded articles which enter or leave the State *through the channels of interstate commerce.*

We cannot believe that the legislature of Pennsylvania intended (1) to permit manufacturers to impose

a minimum price restriction upon goods sold *intrastate,* and, at the same time (2) to permit dealers of other states to flood Pennsylvania territory with the identical articles at cut prices.

In the instant case, District Court Judge Follmer, construed the Miller-Tydings Amendment and the Pennsylvania Fair Trade Act and held that the Pennsylvania statute applied to the defendant dealer who had not signed plaintiff's restrictive contract but had received a copy of such contract and of plaintiff's price list and was engaged in selling plaintiff's products at cut prices to purchasers in other states.

The District Judge construed the Pennsylvania Fair Trade Act as applying to interstate sales to purchasers in another state.

The Court of Appeals held that the Pennsylvania statute applied only to intrastate sales, and reversed.

In the two Schwegmann cases, Chief Judge Hutcheson and Circuit Court Judge McCord of the Fifth Circuit, held that the Sherman Anti-Trust Act, as amended by the Miller-Tydings Act, did not make invalid contracts fixing minimum prices for resale to a purchaser in another state, as authorized by the Louisiana Fair Trade law; and further held that the sellers' price list could be enforced against a resale by a purchaser who had notice of it but had not signed a Fair Trade contract.

Circuit Judge Russell dissented on the ground that the Miller-Tydings act only applied to a purchaser who had signed a price-restricting contract and that as to a non-signing purchaser the contract was in violation of the Sherman Anti-Trust Act.

The ruling of the Third Circuit in the instant case, is directly in conflict with the ruling of the Fifth Circuit in the Schwegmann cases, in respect of (1) the construction and legal effect of the Miller-Tydings Amendment; and (2) the construction of the Fair Trade Laws of Pennsylvania and Louisiana, which are substantially identical.

In the instant case, the opinion of the Court of Appeals in construing the Pennsylvania act as applying to intrastate sales only, was based not upon the language by the Pennsylvania statute, but upon the ground that—

> "These grave constitutional difficulties involved in any broader interpretation lead us to the conclusion that the Pennsylvania Fair Trade Act is to be construed as not to apply to sales by Pennsylvania retailers to consumers in other States, * * * We are reinforced in this conclusion by the well-established line of authority which interprets a statute to conform to constitutional limitations whenever it is possible to do so." (Petition 19a)

Construing the Pennsylvania statute as applying only to intrastate sales, as completely deprives the plaintiff-vendor in the instant case of the benefit of the Miller-Tydings Amendment as if the court had declared the Miller-Tydings Act inapplicable or the Pennsylvania statute unconstitutional.

If the Court of Appeals had construed the Pennsylvania Fair Trade Act and held it to be unconstitutional, its action would have been contrary to the well-established principle that this court will not decide a question of the constitutionality of a State statute until such statute has been construed by the State courts.

This court is asked to review the instant case because its decision in the Schwegmann cases will not necessarily decide this case, although the fundamental question of the effect of the Miller-Tydings Amendment is common to both this case and the Schwegmann cases.

In addition, in the instant case the Court of Appeals ruled that the Pennsylvania Fair Trade Act did not cover interstate sales. In the Schwegmann cases the dissenting opinion of Circuit Judge Russell held that the substantially identical Fair Trade Act of Louisiana did not cover non-signers. The adoption of either of these views would largely defeat the purpose of the Fair Trade Acts of those and many other states.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911) this court decided that a contract between a manufacturer and his dealers, which fixed the prices at which his dealers might sell its proprietary medicines was unlawful both (1) at common law and (2) under the Sherman Anti-Trust Act.

Since this decision two fundamental changes in the law have been brought about:

(1) Fair Trade Acts of 45 states have expressly declared that minimum price contracts be lawful; that non-signers are bound thereby; and

(2) The Miller-Tydings amendment has expressly provided that the Sherman Anti-Trust Act shall no longer render such contracts illegal. 42 states had adopted such Fair Trade acts before the enactment of the Miller-Tydings amendment and the purpose of the amendment was clearly to give effect to these state laws.

Thus both the grounds of the Miles case have been completely removed. It necessarily follows, we submit, that the Miles decision has been wholly superseded.

By the decision of the Court of Appeals, the Pennsylvania Fair Trade Act has been stripped of all application to interstate sales. This decision will effectually bar any remedy in the Federal Courts of New Jersey, Pennsylvania and Delaware against price-cutting *interstate* sales.

If the Federal courts of the other circuits should follow the construction adopted by the Third Circuit, and hold that substantially similar Fair Trade Acts of all the other states were limited to intrastate sales, the purpose of the Miller-Tydings Amendment would be completely defeated.

If the other Federal circuits should limit the application of these Fair Trade Acts to intrastate commerce, in order to avoid "grave constitutional questions", the Miller-Tydings Amendment would be operating in a vacuum.

The language of the Pennsylvania Fair Trade Act is general. It is broad enough to include both interstate and intrastate sales. No word excludes interstates sales or limits the act to intrastate sales.

The opinion of the Court of Appeals did not discuss the language of the Pennsylvania statute.

We respectfully suggest that no language in the Pennsylvania statute limits its application to intrastate commerce and that the construction of the Court of Appeals is erroneous. If the Court of Appeals had con-

strued the Pennsylvania statute as applicable to interstate sales, an important constitutional question would have been presented and decided and would have furnished the basis for a petition for certiorari.

## Conclusion.

The petition for certiorari should be granted.

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No. 538. SUNBEAM CORPORATION *v.* WENTLING. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for reconsideration in the light of *Schwegmann Brothers* v. *Calvert Distillers Corp.*, *ante*, p. 384. *Herman T. Van Mell, Ira Jewell Williams, Jr., Thomas Raeburn White* and *Ira Jewell Williams* for petitioner. *Gilbert Nurick* for respondent. Briefs of *amici curiae* supporting the petition were filed by *Ivan A. Elliott*, Attorney General, and *William C. Wines, Robert J. Burdett* and *John T. Coburn*, Assistant Attorneys General, for the State of Illinois; and *Robert E. Woodside*, Attorney General, and *Harry F. Stambaugh* for the State of Pennsylvania. Reported below: 185 F. 2d 903.